SEP 28 1899
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 138

JAMES HOLLY, PETITIONER,

vs.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA AND E. WALTER ROBERTS.

Notice of Motion and Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

MATTHEW VERNER SIMPSON,
CEPHAS BRAINERD,
JOHN G. JOHNSON,
Attorneys and Counsel for Petitioner.

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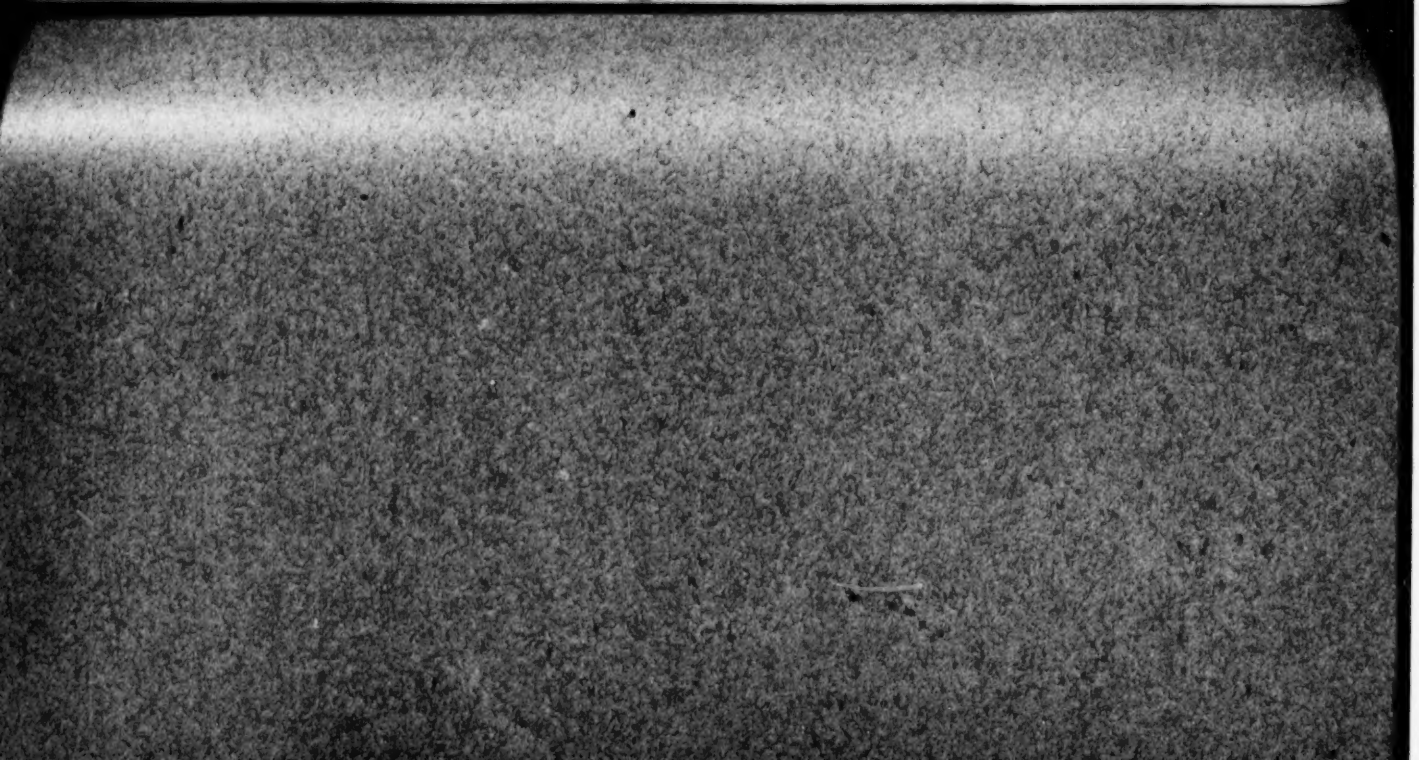

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 409.

JAMES HOLLY, PETITIONER,

vs.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA AND E. WALTER ROBERTS.

NOTICE OF MOTION.

To The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America and E. Walter Roberts, the Above-named Defendants:

Please take notice that on Monday, October 16, 1899, at the opening of the court on that day, or as soon thereafter as counsel can be heard, a motion for a writ of certiorari, of which motion a copy is annexed, will be submitted to the Supreme Court of the United States, at Washington, D. C., for the decision of the court thereon.

In support of said motion a petition and a brief will also be presented to the court. A copy of the petition and of the brief are herewith served upon you.

Respectfully, MATTHEW VERNER SIMPSON,
CEPHAS BRAINERD,
JOHN G. JOHNSON,
Of Counsel for Petitioner.

NEW YORK, , 1899.

Due notice of the foregoing service of motion in the above cause is hereby admitted this day of A. D. 1899.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1899. No. —.

JAMES HOLLY, *Petitioner,*

vs.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA and E. WALTER ROBERTS.

Motion.

And now comes James Holly, the above-named petitioner, by Matthew Verner Simpson, Cephas Brainerd, and John G. Johnson, his attorneys and counsel, and moves this honorable court for a writ of certiorari, directed to the honorable the judges of the United States circuit court of appeals within and for the second judicial circuit, commanding

them forthwith to certify and return to this court all proceedings by them had in the suit lately before them, wherein this petitioner was complainant and appellee and the said The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America and E. Walter Roberts were defendants and appellants.

The matter involved herein relates to the right of your petitioner to establish against the defendants a trust in his favor for the amount of $12,000, which right has been denied by the United States circuit court of appeals for the second judicial circuit, which ordered petitioner's bill to be dismissed.

JAMES HOLLY, *Petitioner*,
By MATTHEW VERNER SIMPSON,
CEPHAS BRAINERD,
JOHN G. JOHNSON,
Attorneys and Counsel.

Due service of the foregoing motion is hereby admitted this day of , A. D. 1899.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1899. No. —

JAMES HOLLY, *Petitioner; In Re* PETITION FOR WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS IN AND FOR THE SECOND CIRCUIT TO CERTIFY TO THE SUPREME COURT FOR REVIEW AND DETERMINATION THE CASE OF JAMES HOLLY, *Complainant and Appellee*,

vs.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA and E. WALTER ROBERTS, *Defendants and Appellants.*

To the Honorable the Supreme Court of the United States:

The petition of James Holly respectfully shows:

1. That petitioner is a resident of the State of Pennsylvania and the defendant The Domestic and Foreign Missionary Society is a corporation incorporated under the laws of the State of New York, and E. Walter Roberts a citizen of that State.

2. That the value of the matter in dispute in the above-entitled cause, as appears by the bill of complainant herein, exclusive of interest and costs, is the sum of $12,000.

3. That this suit was brought to recover certain moneys received by the defendants, The Domestic and Foreign Missionary Society and E. Walter Roberts, through the check of one Thompson, upon the allegation that the check was paid by the misappropriation of a trust fund in Thompson's hands belonging to the complainant.

4. That the facts relating to this matter may be briefly summarized as follows:

James Holly, a citizen of Philadelphia, employed Henry C. Thompson, an attorney-at-law and conveyancer, to examine the title to a property which Holly had purchased, and on approval of it to make settlement for the same with the vendor.

Prior to this, to wit, on December 23, 1887, letters testamentary were granted to said Thompson and Rev. Dr. Benjamin Watson, as executors of the will of James Saul, deceased, the Domestic and Foreign Missionary Society being named as sole residuary legatee. On the 26th day of September, 1889, the executors filed their account (Transcript of Record, p. 250), charging themselves with "the estate of said decedent as per inventory" and with dividends on the stock of the United Railway Association of New Jersey and of the North Penna. R. R. Company, in which said estate was invested, giving credit for their disbursements and showing a balance consisting of stocks to the credit of accountants of $15,800. By the adjudication of the orphans' court, filed on the 4th day of November, 1889, the whole residuary estate thus composed was awarded to the said society. Prior to the adjudication, though the fact did not then appear, Thompson had sold the said stocks, had embezzled all the funds of the said Saul estate, and there was no residuary estate in the hands of the executors at the time of the adjudication. The society never took any steps to enforce payment of the legacy, and only made occasional inquiries concerning it, being put off by Thompson with promises. On the evening of the 18th of June, 1890, his (Thompson's) co-executor requested him to exhibit the securities in which the estate was invested. Thompson promised to do this at one o'clock the next day.

On the morning of the 19th of June, 1890, Holly called upon Thompson to ascertain the state of his business, and was falsely informed by him that the papers were ready, and that he would have everything settled in a few days. He requested Holly to give him a check for the purchase-

money, and Holly immediately gave to Thompson, as his attorney, his check on the Fidelity Insurance, Trust and Safe Deposit Company, in the sum of $12,000, to be applied to the purchase of the said premises, 643 North Fifteenth street, and gave Holly a receipt, of which the following is a copy:

"PHILADELPHIA, June 19th, 1890.

"Received from James Holly twelve thousand dollars and J. A. Freeman's receipt of two hundred dollars, to be applied to purchase of house No. 643 N. 15th St.

"$12,000.

"(Signed) H. C. THOMPSON."

Thompson at once deposited this check in his private account with the Union Trust Company of Philadelphia, and immediately thereafter, **on the same day,** to wit, June 19, drew his check on said trust company for $15,577.54 to the order of the respondents, The Domestic and Foreign Missionary Society of the Protestant Episcopal Church. **On this same day** he took this check to New York and delivered it to E. Walter Roberts, the assistant treasurer, at the office of the society in that city, about one o'clock p. m., and received the following receipt:

"NEW YORK, June 19th, 1890.

"Received from executors estate James Saul, late of Philadelphia, Pennsylvania, fifteen thousand five hundred and seventy-seven and fifty-four hundredths.

"$15,577.54.

"GEORGE BLISS, Treasurer,
"Per E. WALTER ROBERTS,
"Ass't Treasurer."

The check was paid in due course by the said Union Trust Company on the 21st day of June, 1890.

At the time Thompson drew this check he had only about $4,000 to his credit in the said Union Trust Company over

and above the $12,000 belonging to the complainant. When his check was paid it left a balance to Thompson's credit of $826.03.

On July 17, 1890, Holly discovered Thompson's misappropriation of his money. He traced it into possession of the said society and immediately notified the latter of his claim. The money had been deposited by the respondents in the National Bank of New York, and was still on deposit in that bank to their credit at the time Holly notified them that it was his money.

5. There was no substantial conflict about the facts in the case, which were stated carefully in the opinion of Wheeler, J., who decided the case at the circuit court. The circuit court of appeals found the facts to be substantially uncontroverted. A copy of the opinion of the circuit court is hereto attached and marked Exhibit A, and a copy of the opinion of the circuit court of appeals is likewise attached, marked Exhibit B.

6. The circuit court held that upon the authority of Brown *vs.* Smith, 3 How., 763, and National Bank *vs.* Insurance Co., 104 U. S., 54, the complainant was entitled to a decree, and entered a decree against the defendant in the sum of $10,028.82, with interest.

The circuit court of appeals decided that—

"The beneficial owner of trust property, which has been misappropriated by his trustee, is entitled to follow it in a court of equity through any transmutations through which it can be traced and reclaim it in its new form, not only as against the trustee, but also against any other person who has no better equitable title, applies to money which has been entrusted by a principal to his agent for a specific use and which the latter has diverted. * * * Upon this doctrine, the complainant was undoubtedly entitled to follow his money into the hands of the Union Trust Company and reclaim it until it had been withdrawn by Thompson's

check on that fund, and to follow it again through Thompson's hands into the possession of any other person receiving it as a volunteer or with notice of complainant's rights and reclaim so much of it as could be traced into the check; but the missionary society was not a volunteer; it received the money innocently in discharge of a debt. And good conscience did not require it to restore the money to complainant on subsequent information of his rights."

7. The decision of the circuit court of appeals was rendered upon the supposed authority of the case of Swift *vs.* Tyson and kindred cases, which your petitioner respectfully submits does not sustain the reasoning of the court upon the facts which were clearly proved, and that said decision is opposed to the law as laid down in the case of Brown *vs.* Smith, 3 How., 763, and National Bank *vs.* Ins. Co., 104 U. S., 54, and kindred cases.

8. Two questions are presented:

First. Can a party to whom the money of another is paid, if he does not give value therefor, retain the same against the rightful owner, where he does nothing more than give a naked receipt therefor?

This question is answered in the negative by the following cases:

National Bank *vs.* Ins. Co., 104 U. S., 54.
Brown *vs.* Smith, 3 How., 763.
Oliver *vs.* Piatt, 3 How., 333 and 401.
May *vs.* Le Claire, 11 Wall., 217.
Bayne *vs.* U. S., 93 U. S., 642.
U. S. *vs.* State Bank, 96 U. S., 30.
Manhattan Bank *vs.* Walker, 130 U. S., 267.
Jones *vs.* Van Doren, 130 U. S., 684, 691.
Peters *vs.* Bain, 133 U. S., 670, 694.
Swift *vs.* Williams, 68 Md. Rep., 236.
Pennell *vs.* Deffell, 4 De G. M. & G., 372 & 388.
Knatchbull *vs.* Hallett, 13 L. R., Ch. D., 696.

The defendant merely gave to Thompson a receipt for so much money, to wit, $15.577.54. It executed no release. Since said receipt there has been no change in the position of the defendant. Its rights against Thompson and his co-executor are unimpaired. At the time the notice was given the money of Mr. Holly was still in its possession. Nothing whatever to change its relation towards the executors was done between the time of the receipt of the money and of the notice. The Missionary Society had in no way assumed any new obligation or made any change in its affairs predicated upon the possession of this money. The proof shows that the business of the society, which is not a commercial one, was entirely unchanged as to its course and method. Holly's money, therefore, was simply and only an increase in the bank balance of the said society.

Second. Can a legatee whose legacy is payable out of funds of the estate, after the loss of those funds, retain the moneys of a third person fraudulently misappropriated?

Thompson had actually embezzled the funds of the Saul estate. There was no money or property in the hands of the executors. The award of such property was a nullity. The executors could have been made responsible because of the embezzlement, but there was no decree to that effect. Instead of shares of stock, cash was received by the Missionary Society which did not belong to it, but to Holly. The society did not release the executors from liability. If it had given a release, the same would have been important. It took the property of another, not that awarded to it, and it retained all its rights against those who made a wrongful payment. The legacy from the Saul estate was payable only out of the funds of the estate, and, as has been shown, these funds were non-existent. It was the respondent's gross

neglect that prevented it from making the discovery that Thompson had embezzled its funds.

This was not an ordinary commercial transaction. The attempted payment of a legacy three years overdue by a check not drawn by the executors, but by an individual, where no release or discharge was given, bears no resemblance to the payment of an individual note by the maker with his own check, he receiving his paid note from the holder.

The rule that the transfer of negotiable paper before maturity in payment of an antecedent debt constitutes the transferee a holder for value is applicable to commercial paper alone. It is a hard rule, and should only be applied where commercial interests are at stake.

If the decree of the circuit court of appeals is allowed to stand as the law governing cases like this, it will not be difficult for a trustee disposed to be dishonest to easily divert the funds of his *cestui que trust* in order to satisfy the claims of his creditors.

The questions arising in this case, particularly that of the relation of the legatee to the estate from which the legacy is derived, have never been formally decided by this court and are of great importance to every citizen of this country.

9. The opinion of the circuit court of appeals was rendered on the 1st day of March, A. D. 1899, and remanded the cause to the court below, with instructions to dismiss the bill with costs. The decree of the said circuit court of appeals was duly entered, and its mandate has been issued.

10. And your petitioner further represents that said decree of said circuit court of appeals is final between the parties unless this honorable court of its own motion should direct the bringing for review the said cause.

Wherefore petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this hon-

orable court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said court to certify and send to this honorable court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said circuit court of appeals in the said cause therein entitled James Holly, complainant and appellee, against The Domestic and Foreign Missionary Society and E. Walter Roberts, defendants, appellants, in equity, to the end that the case may be reviewed and determined by this honorable court, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeal, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, and that your petitioner may have such other and further relief in the premises as to this court may seem appropriate and in conformity with said act, and that the said judgment of the said Circuit Court of Appeals for the Second Circuit in the said cause and every part thereof may be reversed by this honorable court.

Your petitioner will ever pray, &c.

JAMES HOLLY,
By MATTHEW VERNER SIMPSON,
CEPHAS BRAINERD,
JOHN G. JOHNSON,
His Attorneys and Counsel.

Due service of the foregoing petition is hereby admitted this day of , A. D. 1899.

Defendants.

Exhibit A.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK. IN EQUITY.

James Holly

vs.

Domestic and Foreign Missionary Society.

Henry C. Thompson was a lawyer and real-estate agent in Philadelphia, and was an executor of the estate of James Saul, of Philadelphia, and had in his hands, as such, about $15,000, devised and decreed to the defendant, of New York. The plaintiff gave him a check for $12,000 and a receipt for $200, advanced to pay for a house which the plaintiff had bargained for. He immediately deposited the check in another bank, where he had about $4,000 more; gave his check on that bank to the defendant for $15,577.54, and took a receipt as "from executors estate James Saul" for that amount, without further specification. When the plaintiff learned where his money had gone to, he demanded it of the defendant and brought this suit to reach it.

Principles adequate for the decision of this case are found, as understood, in Brown *vs.* Smith, 3 How., 763, and National Bank *vs.* Insurance Co., 104 U. S., 54. In the former case the defendant had collected a draft belonging to the plaintiff, received from a person who had received it from the plaintiff, and credited the proceeds to the person from whom the defendant received it on an account before due, without any knowledge that it belonged to the plaintiff, or did not belong to him. The plaintiff there was held to be entitled to recover at law, because the money belonged to him, and no new transaction had arisen between the defendant and the one from whom he received it, but the crediting of it on the previous debt. The defendant here is in the same situation in respect to this money, except that the

money was delivered in breach of trust, which is no betterment. In the latter, after a thorough examination of the cases, money is said to be recoverable by the true owner so long as it is traceable and its possession, with liability of its recovery, has wrought no disadvantage.

Thompson had, with the plaintiff's check of $12,000, an apparent credit in the Union Trust Co. of $17,158.60, and drew one check of $42 and another of $50 on the same day that he drew the check for the defendant, but whether either or both before or after that one does not appear; but if after, he had an apparent credit not drawn against of $17,066.60, which would leave $1,489.06 after that check of $15,577.54 was drawn, and which might as well be a part of the plaintiff's as of any other money, and that amount of other money as well drawn against as the plaintiff's; but, if all was so, the check must have been drawn against at least $10,326.94 of the plaintiff's money. Afterwards but $104.35 was deposited, and a check of $507.58 was drawn, and, with these two checks of $42 and $50, paid before the check to defendant was paid, and after that was paid a balance of $885.35 was left to the credit of Thompson. These checks may as well have been paid from, and this balance as well left of, the plaintiff's, as any other money, and, so reckoning them all, there still remains $10,028.82 of the money that went to the defendant which came directly from, and belonged to, the plaintiff. This tracing accords to the defendant full advantage of the fact that neither money itself nor bank credit for money has any ear-marks, and puts upon the plaintiff the burden of showing what of his money must actually have come into the hands of the defendant, by allowing for all that from want of ear-marks or confusion of credits may have in any manner gone elsewhere.

In National Bank *vs.* Insurance Co., 104 U. S., s. 54, Mr. Justice Matthews said, at page 69, in giving a reason for a dissent of Sir George Jessel, Master of the Rolls, from Lord

Ellenborough, "for equity will follow the money, even if put into a bag or undistinguishable mass by taking out the same quantity. And the doctrine that money has no earmark must be taken as subject to the application of this rule."

The plaintiff, before learning where his money had gone to, undertook by legal proceedings to collect it of Thompson. This is claimed to be such an election of rights or remedies as to prevent recovery of the defendant afterwards. The defendant does not appear to have been induced by that to do or leave undone anything otherwise than was done, or to have been in any way affected by that course which, if it had been successful, would have been advantageous to the defendant. In National Bank *vs.* City Bank, 103 U. S., 668, the plaintiff sought to recover for negligently delivering wheat to an elevator belonging to A. F. Smith & Co., drawers of drafts secured by bills of lading, which was followed and partly recovered after it had been drawn out of the elevator and forwarded to others. As to this Mr. Justice Miller, in delivering the opinion of the court, said:

"Some question is made in the argument as to the effect of proceedings taken by plaintiff to recover the wheat or its value of parties who bought or received it from A. F. Smith & Co. It is only necessary to say, if the jury shall be of opinion that defendant was negligent in delivering the wheat to A. F. Smith & Co. it is responsible to plaintiff for the amount of the unpaid drafts less any sum not actually recovered from others."

Here the plaintiff recovered nothing of Thompson, and there is nothing to be deducted. Some suggestion is made that this was received as a charitable bequest, and so applied that it had gone beyond reach and cannot be recovered; but the defendant has not shown that this particular money has been applied to any particular purpose as coming from Saul, or otherwise than as it would use its general funds in

furtherance of its objects, nor that any of this particular money was applied to any of its purpose.

As the defendant retained the money after notice that it was the plaintiff's and claimed by him, interest upon it follows from that time.

Decree for plaintiff for $10,028.82, with interest.

(Signed) HOYT H. WHEELER.

EXHIBIT B.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

JAMES HOLLY, *Appellee*,

vs.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA ET AL., *Appellants*.

WALLACE, *Circuit Judge*:

This is a suit brought to recover certain moneys received by the defendant, The Domestic and Foreign Missionary Society, etc., through the check of one Thompson, upon the theory that the check was paid by the misappropriation of a trust fund in Thompson's hands belonging to the complainant. The facts are these: The complainant employed Thompson as an attorney and conveyancer about the purchase of certain real estate, and June 19, 1890, delivered to him a check for $12,000, with instructions to apply the proceeds to the payment of the purchase-money. Instead of doing so, Thompson used the check as a credit item in his account with the Union Trust Company, and misappropriated the proceeds by checks drawn by him on the trust company. Among these checks was one dated June 20, 1890, for $15,577, payable to the order of the Missionary

Society. Thompson was one of the executors of the estate of James Saul, under whose will the Missionary Society was a legatee. A decree of the probate court having jurisdiction in the premises had been entered in November, 1889, settling the accounts of the executors and ordering payment of the legacy. Thompson's co-executor was a clergyman, and had left the administration of the estate and the control of the funds exclusively to Thompson; and the Missionary Society became urgent for the payment of the legacy, wrote several letters to Thompson about it, and also wrote to his co-executor. The latter informed the Missionary Society in substance that the delay in paying the legacy was solely attributable to Thompson's dilatory disposition. His patience finally seems to have become exhausted, and he insisted that Thompson should produce the securities of the estate for his examination, and fixed a day for that purpose. On that day, before the time appointed, he received a note from Thompson, stating that he was going to New York to settle with the Missionary Society. The next day Thompson called at the office of the Missionary Society and delivered to its treasurer the check for $15,577, the amount being the sum due as principal and interest upon the legacy. The Missionary Society accepted the check in payment, receipted for the amount to the executors, and shortly thereafter collected the check. According to the finding of the court below, this check was, to the extent of $10,028, paid by the Union Trust Company out of the moneys realized from the check of the complainant. The court below decreed against the Missionary Society for that amount in favor of the complainant.

The proofs do not disclose any fact or circumstance tending to show that the Missionary Society supposed when it received Thompson's check that the check was not drawn against his own funds. The circumstance that the payment was made by his individual check, and not by that of the executors, was suggestive of irregularities in his conduct as an

executor, but it does not seem to have created any suspicion of his integrity, and was not calculated to do so. There was no impropriety in his paying a debt of the estate with his own funds, if he saw fit to do so. The Missionary Society undoubtedly received it in entire good faith. Upon these facts we are constrained to conclude that the complainant was not entitled to a decree.

The familiar doctrine that the beneficial owner of trust property which has been misappropriated by his trustee is entitled to follow it in a court of equity, through any transmutations in which it can be traced, and reclaim it in its new form, not only as against the trustees, but also against any other person who has no better equitable title, applies to money which has been entrusted by a principal to his agent for a specific use, and which the latter has diverted. In the case of a principal or of any person who has a legal title, the money is recoverable at law by an action for money had and received (United States *vs.* State Bank, 96 U. S., 35), and the interposition of equity is unnecessary. The old notion that money cannot be thus followed because it has no ear-marks has been exploded; though in many cases, where it has been mingled with other moneys of the wrongdoer or been converted into other property, the practical difficulty of identifying and following it is insuperable. Knatchbull *vs.* Hallett (13 Ch. Div., 696), McLarren *vs.* Brewer (51 Maine, 402), Brosniham *vs.* Sheehan (125 Mass., 11), Van Allen *vs.* American National Bank (52 N. Y., 1), National Bank *vs.* Insurance Co. (104 U. S., 54). Upon this doctrine undoubtedly the complainant was equitably entitled to follow his money into the hands of the Union Trust Company and reclaim it until it had been withdrawn by Thompson's check upon that company, and to follow it again through Thompson's hands into the possession of any other person receiving it as a volunteer or with notice of complainant's rights, and reclaim so much of it as could be traced into the check. But the Missionary Society was not a

volunteer. It received the money innocently in discharge of a debt, and good conscience did not require it to restore the money to the complainant on subsequent information of his rights. Neither in equity nor at law, in an action for money had and received, can he whose trust moneys have been perverted, prevail against the title of one who has acquired them *bona fide* and for value. He who receives money or acquires negotiable paper in payment of a debt is a holder for value, and if he receives the money innocently or acquires the commercial paper before its maturity, and without notice of any infirmity, has a perfect title, which cannot be subordinated to the equities of any third person.

In the action for money had and received, which is controlled by principles of equity, and in which the general rule is that the plaintiff is entitled to recover money *ex æquo et bono* the defendant ought to refund, there are many illustrations of the doctrine that a defendant who had received money innocently in payment of a debt is under no obligations to restore it, notwithstanding, as between the plaintiff and the person from whom the defendant received it, it ought to be regarded as the money of the plaintiff. In Merchants' Insurance Co. *vs.* Abbott (131 Mass., 397) the plaintiff, an insurance company, paid a loss upon the order of one Abbott, the assured, to persons to whom the latter was indebted, and, upon discovering that the loss was fraudulent, brought the action against them to recover back the amount. The court held that the action would not lie, Gray, C. J., saying:

"These defendants hold no money which *ex æquo et bono* they are bound to return, either to Abbott or to the plaintiffs."

In Miller *vs.* Race (4 Burr, 452) Lord Mansfield said:

"Money shall never be followed into the hands of a person who *bona fide* took it in the course of currency and in the way of his business."

In Mason *vs.* Wait (17 Mass., 563) the court said:

"It would be mischievous to require of persons who receive money in the way of business or in the payment of debts, to look into the authority of him from whom they received it."

In Lime Rock Bank *vs.* Plimpton (34 Mass., 159) it was held that money of a principal misappropriated and lent by his agent to a creditor, the agent being indebted to the creditor in a larger sum and the creditor receiving the money *bona fide*, could not be reclaimed by the principal, as in a suit by the principal the creditor could set off the agent's debt. The court said that in respect to money the owner could not follow it, "not only because money has no earmarks, but because a different doctrine would be productive of great mischief." In Justh *vs.* National Bank of the Commonwealth (56 N. Y., 483) the court stated "that if money which had been received in the regular course of business can be followed, the transaction of business must be stopped, for no security and no precaution can guard the receiver from responsibility." In Stevens *vs.* The Board of Education (79 N. Y., 187) the court used the following language:

"It would introduce great confusion into commercial dealings if the creditor who receives money in the payment of a debt is subjected to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and convenience and to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to third persons dealing with him and receiving it in due course of business and in good faith upon a valid consideration, if the consideration is good as to all the world."

Ever since the case of Smith *vs.* Tyson (16 Peters, 1) it has been the law of the Federal courts that the transferee of commercial paper, who receives it in payment or as security

for an antecedent debt, is a holder for value. Railroad Co. *vs.* National Bank (102 U. S., 14); McMurray *vs.* Moran (134 U. S., 150). It is immaterial, therefore, whether the check received by the Missionary Society is treated as money or as commercial paper; in either form, as it was taken *bona fide* and in payment of a debt, no part of the amount can be reclaimed by the complainant.

The following adjudication may be cited in support of the general proposition: State Bank *vs.* United States (114 U. S., 401) was a case in which, by the connivance of a clerk of the office of an assistant treasurer of the United States, one carrier unlawfully obtained from that office money belonging to the United States, and to replace it delivered to the clerk money which he obtained by fraud from the plaintiff, the clerk having no knowledge of the fraud. The court held that the United States was not liable to refund the money. In Goshen National Bank *vs.* State of New York (141 N. Y., 379) the defendant, in payment of moneys due from a county treasurer, received a draft wrongfully and fraudulently drawn by him as cashier of the plaintiff upon another bank, the plaintiff's correspondent. In an action to recover the amount of the draft which the plaintiff had been compelled to pay to its correspondent, the court held, that as the defendant had received the draft in good faith the plaintiff could not recover. The court said:

"The interposition of the draft makes no difference in principle after it has been paid. It is then the same as if the money had been originally paid instead of an order given for its payment."

Hatch *vs.* National Bank (147 N. Y., 184) was a case in which a bank in good faith, in the ordinary course of business and without notice, had received from a customer checks of third parties, obtained by his unlawful pledge of the securities of the plaintiff, and the bank, pursuant to a continuing agreement with the customer to that effect, ap-

plied the checks in payment of an existing indebtedness against him. The court held that the bank was not liable to refund the money due to the owner of the securities. The court said:

"If, therefore, Smith had come with the money and with it had paid his debt over the counter, the amount could not have been recovered by the plaintiff, although admitted to have been actually the proceeds of the stolen certificate."

And added by Finch, J.:

"I think the situation was not at all changed because the debtor came with Ferris & Kimball's check, which the bank collected."

The case of Swift *vs.* Williams (68 Md., 236) is cited by the appellee as an adjudication in his favor and as sanctioning the proposition that the equitable owner of misappropriated trust funds can follow them into the hands of a creditor who has taken them innocently in payment of a debt. We have been unable to find any other adjudication to this effect, and we regard the decision as a departure from principle and authority.

The decree is reversed, with costs and with directions to the court below to dismiss the bill.

1631

No. xxxq. 138

Br. of Brainerd & Johnson for Pet

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Sept. 28, 1899.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk

No. 409.

JAMES HOLLY, PETITIONER,

vs.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA AND E. WALTER ROBERTS.

Brief in Support of Motion for Petition for Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

MATTHEW VERNER SIMPSON,
CEPHAS BRAINERD,
JOHN G. JOHNSON,
Attorneys and Counsel for Petitioner.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 9-28-'99

IN THE

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JAMES HOLLY, PETITIONER,

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THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA AND E. WALTER ROBERTS.

The principal contention of the defendants in this case in the court below was that Thompson was indebted to the defendant Missionary Society in an amount greater than the sum of $15,577.54, and that the check for that amount was given to the society in payment of that debt; that this sum was received by defendant in good faith and without notice of any equity or claim on the part of the complainant.

It cannot be disputed that Thompson obtained from the complainant Holly the sum of $12,000 as a trust fund. The check was given by Holly to Thompson as attorney (R., pp. 50 and 94). The receipt which was given for the said $12,000 expressly stated that the said amount was "to be

applied to purchase of house No. 643 N. 15th St." This was an express acknowledgment and declaration on the part of Thompson that the money which was obtained from Holly was a trust fund for the purpose mentioned. By Holly's check to Thompson's order as attorney Thompson was appointed trustee for the fund. This was all that was necessary to perfect the trust as completely as could possibly be done in the creation of an express trust.

"Express trusts are also called direct trusts. They are generally created by instruments that point out directly and expressly the property, person and purposes of the trust."
1 Perry on Trusts, sec. 124.

Neither can it be disputed that the trust fund was wrongfully, fraudulently, and feloniously obtained and misapplied. The intent and purpose with which it was obtained is shown by the fact that his (Thompson's) co-executor, after numerous demands had been made upon Thompson, called upon him on the evening of the 18th and demanded to see the securities in which Thompson had all along declared Saul's estate was invested, and of which the co executor had notified the society, particularly by the letter addressed to Dr. Langford under date of May 29, 1890 (Exhibit M, defendant's supplemental answer, R., p. 43, fols. 166–168), in which it was stated, "For your information I will say, most of the legacy is in bonds, so that it is accumulating interest to the credit of the legatee," and Thompson agreed to produce them the next day at one o'clock, when his co-executor was to call and examine them (R., p. 83, fols. 146, 147). After thus promising what he knew he could not perform, and being without other available means to secure the amount required to be paid by the Saul estate, he took advantage of Mr. Holly's calling the next morning to inquire about his business, to induce Holly, by falsely stating that the papers were ready, to deposit the $12,000 in his (Thompson's) hands for the purchase of the property.

Thompson's immediately taking that money and depositing it in his individual account, and drawing upon it, with what amount he had in bank, a check for $15,577.54 in favor of the defendants, and handing that check over to the defendants, is conclusive of the intent with which Thompson obtained Holly's money. The whole transaction was a continuous one, so far as Thompson was concerned, beginning with his falsely inducing his client Holly to hand him the check, under the pressure of the disclosure of his wrongdoings in Saul's estate, which would inevitably follow if he had not taken this course.

It is submitted that Holly never parted with his ownership of the money. Thompson therefore could not make title to another for property of which he was not the owner.

"If a trustee deposits trust moneys in bank to his own credit, mixed with other deposits of his own money, the court will disentangle the accounts and give the *cestui que trust* what belongs to them. And the same will be done wherever property held in trust has been wrongfully mixed or misapplied, though in the hands of a third person, unless he is a *bona fide* purchaser without notice; but the bill must specify the property which it identifies with the trust fund."

2 Perry on Trusts, secs. 837 and 838.

"The general proposition which is maintained both at law and in equity upon this subject is that if any property in its original state and form is covered with a trust in favor of the principal, no change of that state and form can divest it of such trust or give the agent or trustee converting it, or those who represent him, in right (not being *bona fide* purchasers) any more valid claim in respect to it than they had before such change."

2 Story Eq. Jur., sec. 1258.

"Equity impresses a constructive trust upon this species of property, not only while it is in the hands of the original wrong-doer, but as long as it can be followed and identified in whosesoever hands it may come, except unto those of a

bona fide purchaser for value, without notice, and the court will enforce the constructive trust for the benefit of the beneficial owner or original *cestui que trust* who has thus been defrauded."

2 Pomeroy's Eq. Jur., p. 1562, ed. of 1892, sec. 1051.

"And the better opinion on authority now is that even as to creditors the mixing of trust funds with private in a general deposit does not obliterate the trust."

2 Perry on Trusts, sec. 828.

"And it may be added that an abuse of trust can deprive the *cestui que trust* of no rights, so long as the property or its proceeds can be traced and identified in the hands of those who have full knowledge of all the equities."

2 Perry on Trusts, sec. 835.

Upon the delivery of the check by Thompson to the defendant, the defendant gave a receipt therefor, of which the following is a copy:

"NEW YORK, June 19, 1890.

"Received from executors estate James Saul, late of Philadelphia, Pennsylvania, fifteen thousand five hundred and seventy-seven and fifty-four hundredths.

"$15,577.54.

"GEORGE BLISS, Treasurer,
"Per E. WALTER ROBERTS,
"Ass't Treasurer."

Two questions are presented by the record:

First. Can a party to whom the money of another is paid, if he does not give value therefor, retain the same against the rightful owner where he does nothing more than give a naked receipt therefor?

In this connection it should be specially noted that the Missionary Society made no change in its affairs by reason of the receipt of the money from Thompson. It did not

pay out the money. It always, till weeks after its receipt, had a bank balance greatly in excess of the amount of Thompson's check; nor did it in any way increase its expenses or incur new obligations. Its business proceeded as it had theretofore done. The society simply had an increased balance to its credit.

Second. Can a legatee whose legacy is payable out of funds of the estate, after the loss of those funds, retain the moneys of a third person fraudulently misappropriated?

In the case of Pennell *vs.* Deffell, 4 De G. M. & G., 372 and 388, Lord Justice Turner says:

"It is, I apprehend, an undoubted principle of this court that, as between *cestui que trust* and trustee and all parties claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the proofs of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust."

Vice-Chancellor Sir W. Page Wood, in Frith *vs.* Cartland, 2 Hem. & M., 417 and 420, said that Pennell and Deffell rested upon and illustrated two established doctrines. One was that "so long as the trust property can be traced and followed in other property, into which it has been converted, that remains subject to the trust." The second is "that if a man mixes a trust fund with his own, the whole will be treated as the trust property, except so far as he is able to distinguish what is his own."

The whole subject was very elaborately reviewed by the court of appeals in England in the very recent case of Knatchbull *vs.* Hallett, *In re* Hallett's Estate, 13 L. R., Ch. D., 696.

It was there decided that if money held by a person in a

fiduciary character has been paid by him to his account at his bankers', the person for whom he held the money can follow it.

The Master of the Rolls, Sir Geo. Jessel, in Clayton's case, 1 Mer., 572, showed that the modern doctrine of equity as regards property disposed of by persons in a fiduciary relation is that whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify it.

This principle has been frequently recognized by this court.

In Wilson & Co. *vs.* Smith, 3 How., 763, it is held:

"Whenever by express agreement of the parties, a sub-agent is to be employed by an agent to receive money for the principal, or where an authority to do so may fairly be implied from the usual course of trade, or the nature of the transaction, the principal may treat this sub-agent as his agent, and when he has received the money, may recover it in an action for money had and received. If in such case the sub-agent has made no advances and given no new credit to the agent on account of the remittance of the bill, the sub-agent cannot protect himself against such an action by passing the amount of the bill to the general credit of the agent, although the agent may be his debtor."

In Oliver *vs.* Piatt, 3 How., 333, it is held: In case of trust, where the trustee has violated his trust by an illegal conversion of the trust property, the *cestui que trust* has a right to follow the property into whosesoever hands he may find it, not being a *bona fide* purchaser for a valuable consideration, without notice. Where a trustee has in violation of his trust invested the trust property or its proceeds in any other property, the *cestui que trust* has his option either to hold the substituted property liable to the original trust or to hold the trustee himself personally liable for the breach of the trust. The option is for benefit of *cestui que trust* alone, not for the benefit of the trustee.

An agent employed by a trustee in the management of the trust property, and who thereby acquires a knowledge of the trust, is, if he afterward become possessed of the trust property, bound by the trust in the same manner as the trustee. Where upon the face of the title papers the purchaser has full means of acquiring full knowledge of the title from the references therein made to the origin and consideration thereof, he will be deemed to have constructive notice thereof.

In U. S. *vs.* State Bank, 96 U. S., 30, it is held: Where a trust fund has been perverted, the *cestui que trust* can follow it at law as far as it can be traced.

The United States cannot, against the claim of an innocent party, hold his money which has gone into its treasury by means of the fraud of its agent.

The rules of law applicable to an individual in a like case apply also to the United States.

The same doctrine is announced in the following cases:

National Bank *vs.* Ins. Co., 104 U. S., 54.
May *vs.* Le Claire, 11 Wall., 217.
Bayne *vs.* U. S., 93 U. S., 642.
Manhattan Bank *vs.* Walker, 130 U. S., 267.
Jones *vs.* Van Doren, 130 U. S., 684, 691.
Peters *vs.* Bain, 133 U. S., 670, 694.

In Van Allen *vs.* Bank, 52 N. Y., 1, it is held: Where an agent deposits in a bank to his own account the proceeds of property sold by him for his principal under instructions thus to keep it, a trust is impressed upon the deposit in favor of the principal, and his right thereto is not affected by the fact that the agent at the time deposits other moneys belonging to himself, nor is it affected by the fact that the agent substitutes other money in depositing. In such cases, in an action by the principal against the bank upon its refusal to pay upon presentation of agent's check for the amount

so deposited, the bank cannot set up a want of privity. It is a question of title solely.

Farmers' and Mechanics' National Bank *vs.* King, 57 Pa. St., 202.

In Swift *vs.* Williams, 68 Md. Rep., 236, decided in the Maryland court of appeals, W and V were trustees for the sale of certain real estate. W, being about to go abroad, obtained an order from the court authorizing V to receive the purchase-money from the purchaser, and in all respects to act as fully in all matters pertaining to said trust as if both were present and acting. The purchaser gave V a check for the purchase-money, payable to the order of W and V, trustees. V indorsed this check with his own name only as trustee to the Manufacturers' national bank for deposit, giving the bank a copy of the court order, and opened account in that bank in his name as sole trustee, although there was at that time an account in the bank in the name of both trustees. On the same day V drew a check for a portion of said deposit on said bank, signed by himself alone as trustee, in payment for a debt of a certain company of which he was sole trustee, to one Swift, which debt was in no way connected with the said trust fund, and the check, on reaching the Manufacturers' bank through the clearing-house, was charged to the said account of V as sole trustee.

The bank on which the check was drawn which was given to V, and made payable to the order of both trustees by the purchaser of the trust real estate, refused to honor it because indorsed by V alone. V thereupon arranged with the Manufacturers' bank to alter the indorsement by signing W's name as trustee, and to change the deposit so as to stand in the names of both trustees. The bank on which the purchaser's check was drawn refused, however, to honor it on such new indorsement, and the purchaser obtained a cashier's check from said bank for the same amount and deposited it in the Manufacturers' bank to the joint credit

of W and V, trustees, and took up his own check; thereupon V added the name of W, trustee, per V, trustee, to the check he had theretofore drawn on the Manufacturers' bank, and it was charged up by that bank against the account in the name of both trustees.

A bill in equity was filed against V, the Manufacturers' Bank, and Swift, to whom the amount checked out by V was paid, to compel the replacement of the trust money which was misappropriated through the check given by V to S in payment of a debt which was in no way connected with said trust fund. It was held that the defendant bank equally with the other defendants was bound to see that the trust fund, improperly appropriated through its aid, was made good, and that the question was not one of primary and secondary liability, but whether all who had participated in any degree in bringing about the wrong should not be compelled to see it righted; and, further, that an antecedent debt does not form a valuable consideration in a case of this kind, so as to make a creditor, who is paid from a wrong trust fund, a purchaser without notice.

Per IRVING, *J.*:

"Swift cannot be regarded as a *bona fide* purchaser without notice. He was the creditor of the Gazette Publishing Company, and of its funds in the hands of Veazy, its trustee. As such creditor he received payment from funds belonging to the Bull estate, and from none belonging to the publishing company. The general rule is that an antecedent debt does not form a valuable consideration in a case of this kind, so as to make the creditor who is paid from wrong funds a purchaser without notice (2 Pomeroy, Eq., 622, and authorities cited)."

Swift *vs.* Williams, 68 Md., 236, is cited in 2d Pomeroy's Equity (edition of 1892), section 747, note, page 1044, as an authority for the statement in the text that—

"No person who has acquired title as a mere volunteer, whether by gift, devise, inheritance, post-nuptial settlement on wife or child, or otherwise, can thereby be a bona fide purchaser."

The defendants further contended that, as executors of the will of James Saul, deceased, having filed their account in the orphans' court of Philadelphia county, showing a balance due to the defendant Missionary Society of $14,927.54, which account was confirmed absolutely November 23, 1889, thereby became jointly and severally liable to the defendant Missionary Society for the entire amount (Defendants' Exhibit J, R., p. 249, fol. 325, and Exhibit O, R., p. 44, fol. 170); and, being thus indebted, defendants' counsel contend that the giving of the check constituted the Missionary Society a holder for value of Holly's money.

The rule that the transfer of negotiable paper before maturity in payment of an antecedent debt constitutes the transferee a holder for value is applicable to negotiable commercial paper alone. It has no application to the transfer of negotiable paper which has matured, or to the payment of a check which is payable on demand.

Moore *vs.* Ryder, 65 N. Y., 438.

The defendants cannot claim to be *bona fide* purchasers for value without notice in this case, because they were actually informed of facts and circumstances and had oft-repeated warnings which put them upon inquiry which, if made and followed up, would have led them directly to full knowledge of the embezzlement of the whole of Saul's estate and of Thompson's insolvency long before they obtained Holly's money. With this knowledge of his insolvency, defendants should not have accepted Thompson's individual check as a payment on account of the legacy. The pretense that this was an ordinary commercial transaction is absurd. It has no single feature according with such dealings. The attempted payment of a legacy three years past due with a check,

not drawn by the executors, but by an individual, where no release or discharge was given, bears no resemblance to the payment of an individual note by the maker with his own check and receiving that paid note from the holder.

With notice of Thompson's embezzlement, the respondents accepted his individual check for $15,577.54 instead of demanding from him the securities in which they had been informed that the estate was invested. At the same time Thompson handed them the following memorandum, which was in his handwriting :

Estate James Saul :

Balance as per account filed.....	$14,927 54
Dividends received since, not included in account.....	650 00
	$15,577 54

But in accepting his individual check they knew that they could only rightfully claim payment of it out of what individual moneys he might then have in the bank to his credit. They could not thereby acquire any property or right to trust funds that Thompson might have obtained from other parties and deposited with his own moneys in his individual account upon which the check was drawn.

"A check is, by its face, the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer."

Grant on Banking, 85.

Keene *vs.* Bread, 8 C. B. N. S., 373.

It is contended by the respondents that they became *bona fide* holders for a valuable consideration of this fund by virtue of their having received it on account of this legacy, but the fact is they did nothing but simply receive the money. They parted with nothing whatever at the time. They did not release Thompson or his co-executor; they simply gave him a receipt, as " from executors' estate James

Saul," for so many dollars in money (fols. 130–132). It did not state what it was on account of, whether it was a legacy or a debt *due* the society.

Under these circumstances the respondents can plead neither innocence nor consideration.

"Where an owner has been apparently deprived of his title by a fraudulent conveyance or assignment, which is void, as where, after being executed by him for one purpose, it was fraudulently altered without his knowledge or authority * * * and he has done no collateral act with reference to it which might amount to an equitable estoppel by conduct, and the property, by means of such transfer, comes into the hands of a purchaser for value and without notice, the original defrauded owner is not barred of his remedy. Equity will relieve by canceling the fraudulent apparent transfer and by compelling a conveyance or reassignment, even as against the holder who is innocent of wrong. The doctrines of equitable estoppel and of *bona fide* purchase do not apply under these circumstances. Such is the doctrine announced by decisions of the highest authority."

2 Pomeroy's Eq., ed. of 1892, sec. 918, pp. 1302–3, citing Ogilvie *vs.* Jeaffreson, 2d Gifford, 353.
Swan *vs.* N. British, &c., Co., 7 Hurlst & N., 603.
Taylor *vs.* Railway Co., 4 De Gex & Jones, 559.
Donaldson *vs.* Gillot, L. R., 3 Equity, 274.
Barnard *vs.* Campbell, 58 N. Y., 73; S. C., 55 N. Y., 456.

Defendants further contended that the Missionary Society had expended the proceeds of Thompson's check before they had knowledge of Holly's claim.

This is not in accord with the facts as proved. The bank account of defendant with the National Bank of New York (R., pp. 153–171) shows that on June 20, 1890, there was a balance to the credit of the defendants in that bank of $43,569.83; that on that day there was a deposit of $16,540.26. The deposit ticket for this amount was produced and showed that Thompson's check for $15,577.54 was included in that

deposit. The total amount of the balance in bank, including that day's deposit, was $60,110.09. Between June 20, 1890, and July 18, 1890, inclusive, when notice was received by the defendants that the money belonged to Holly, the defendants had received and deposited additional sums of money, amounting to $45,265.81, making a total of deposits from June 20 up to July 18, 1890, of $105,375.90. Against this the society had drawn checks for $74,663.96, leaving a balance of moneys belonging to defendants of $30,711.93 on deposit, July 19, 1890, the day after they received the notice that it was Holly's money, or $18,711.93 of their own money, exclusive of the $12,000 of Holly's money. During all this interval of time there was not a single day in which there was not a balance of money belonging to the society on deposit in the National Bank of New York largely in excess of the amount which belonged to Holly, and, therefore, the money belonging to Holly and not to the society, was not touched by check or draft during all that time. The defendants can only be presumed to have drawn upon their own funds and not upon any of which they obtained possession or control through the fraud of Thompson as their executor and trustee of the moneys belonging to the Saul estate. They could not profit by the fraud of their agent in paying them the money which their agent knew at the time belonged to other parties. (See R., p. 195, fol. 592 to 595.)

U. S. *vs.* State Bank, 96 U. S., 30.

Defendants further claim to be holders for valuable consideration upon the idea that having received the money as legatees under the will of Dr. Saul, and their assistant treasurer having clerically gone through the form of dividing the amount by three, that thereupon the moneys received from Henry C. Thompson, executor, as alleged in the fifth section of the supplemental answer (fols. 129, 130), were expended for domestic missions, foreign missions, and

for the benefit of the colored people in the Southern or formerly slave States for the support of schools and missions, and the application is declared to have been made under a resolution of the board passed on the 10th day of June, 1890 (fols. 172, 130); this application could not affect moneys which belonged to another, but only such as rightfully went into the treasury of the society for the purpose. As late as August 4, 1890, after all their previous checks had been received and paid by the bank, they still had in bank the sum of $18,610, and at no time prior thereto did they have a less sum on deposit to their credit.

The rule of legal accounting requiring that the first debit shall be charged against the first credit in an account, has no application to this case. Under no circumstances could it apply to funds fraudulently obtained and deposited to the credit of the society, when the defendants had their own funds that could properly be drawn upon at the same time to meet their expenses. Deposits were made from time to time as the business of the society was ordinarily conducted, and their checks were drawn upon their deposits in the usual course, and therefore could not affect a fund which had been fraudulently transferred to their deposit account, but only their own funds, so long as those funds should be sufficient for the purposes of their business. If they had exhausted their own funds on any day between the 19th of June and the 18th of July, and had to take from Holly's money to make up the payments of the day, there might be some ground for the contention, but there was not a single day within that period when their own funds were exhausted, and, consequently, Holly's money lay in the bank wholly unaffected by their drafts upon funds which rightfully belonged to them.

The defendants further contended that there was no competent evidence to show that any money of the complainant ever came into the hands of the defendant Missionary So-

ciety; that the books of Thompson as produced and offered in evidence were, as regards the defendants, the merest hearsay, and therefore incompetent and inadmissible. To these points it is replied:

First. That Henry C. Thompson was executor and trustee for, and as such the representative of, the defendants at the time these entries were made in his books, and they were, therefore, the principal's entries as much as they were those of its representative in the trust.

They were not the private entries of third persons, but they were the entries of an agent or trustee in regard to the trust fund, showing his transactions relating to that fund, by which, as against third parties, the principal as well as the representative is bound. In this case the defendants allege that they had received this money in payment of a legacy of the Saul estate. What was the answer to this? Their trustee's own account showed that the money which Thompson had received on their account had long since been appropriated to his own use. How was this "hearsay," or how was this evidence incompetent, it being the evidence from his books of charges against his interest as that of their own trustee?

The relation of Thompson and his co-executor as their trustee was the same after the adjudication had been made of the executors' account as it was before the adjudication. The adjudication was an award of the residuary estate to the defendants, in money or in kind, in the condition that it was then supposed to be. Thompson was still occupying the position of trustee for these defendants at the time he took Holly's money, and was acting as such trustee when he made payment to his *cestui que trust;* he was not acting in the ordinary capacity of a debtor to the society. The only effect of the adjudication was to charge the executors as trustees with the balance of the estate then in their hands as fixed by the inventory and appraisement with which they stood charged in their account as adjudicated.

"He [the executor] is considered as a trustee holding a resulting trusteeship for those entitled, either as residuary legatees or next of kin. At no one time in this State was it [the appointment to an executorship] an extinguishment of the debt [due by an executor to the decedent], for the executor has always been held as a trustee." Wilson *vs.* Wilson, 3 Binney, 557; per Sterrett, J., in Pringle *vs.* Pringle, 130 Pa. St., 565, 569.

Whenever an agent makes a business arrangement or does an act representing his principal, what he does in respect to the arrangement or act while it is in progress is so far part of the *res gestæ* as to be subsequently admissible in evidence on behalf of either party. Whenever the agent's acts are so admissible, then his contemporaneous declarations explanatory of these acts are admissible; nor in proving such declarations is it necessary that he should be himself called.

2 Wharton's Evidence, sec. 1173.

The entries in the bank book of Thompson and in his diary and the deposit ticket were, with the original checks, the immediate accompaniments of the fraudulent acts of Thompson and admissible as part of the *res gestæ*.

"Coincident business declarations are hence to be received to qualify the acts to which they relate."

1 Wharton's Evidence, sec. 262.

See also 1 Greenleaf's Ev., sec. 115.

Second. It is not necessary to go over all the evidence as to whether or not the defendants had in their bank at the time of the notice, this money of Holly. Complainant's Exhibit No. 9, R., pages 136 and 195, taken in connection with Mr. Burton's testimony (R., pp. 136 and 137, fols. 356–363), put this beyond question. From the day they deposited Thompson's money in the Bank of New York down at least to August 5, the current charges of the defendant were paid out of honest money, and the stolen fund re-

mained in that bank to the credit, in judgment of law, of Holly, the man from whom Thompson had taken it.

Defendants say that Holly opened a debtor and credit account with Thompson. If this be so, then the fiduciary relation of attorney and client has disappeared; but when a client delivers a bag of money to his lawyer, and takes from him a receipt which declares, in accordance with the fact, that the money is to be applied to the payment of the client's purchase price of a specific lot of land, that attorney becomes something more than a mere debtor. The suggestion that money has no "earmarks" would be good if it were not that courts of equity have for years been engaged in tracing stolen money and making decrees restoring it to the legitimate owners.

In re Irish-Am. Bk., 73 N. W. R., 6.

The defendants further contended the plaintiff had previously commenced an attachment proceeding, and was thereby estopped from maintaining this suit against the defendant.

The facts in this record are as follows: The plaintiff Holly was in ignorance as to the true state of his business with Thompson until the 15th day of July, 1890 (Q. 21, R., p. 50). He applied to his Philadelphia counsel, Mr. Burton, the same evening (Q. 6, R., p. 129). On the next morning the investigation was commenced, and, on the partial information then obtained, the affidavit was prepared which was made and filed (R., p. 175, fols. 512–523) on the 17th day of July (fol. 536), when the attachment as it bears date was issued and served (fols. 538–540).

Prior to the issuing of the attachment Mr. Burton had been unable to ascertain the history of the transaction. He was told by the bank that no information could be given him "unless it was in response to legal proceedings that had been taken" (R., p. 130, fol. 133). The desired information could not be obtained until after counsel for Mr.

Holly had instituted attachment proceedings and had served it upon the bank which had collected Thompson's check for the society in New York. Then, in response to Mr. Burton's inquiry (R., p. 130, fol. 335), he ascertained the course which the fund of his client had taken, and that the check was drawn to the order of the society respondent (R., p. 130, fol. 335). Mr. Burton immediately addressed a letter to the defendants (see defendants' answer, R., pp. 20 and 21, fols. 80–83), enclosing copy of plaintiff's affidavit in the attachment suit.

Now, what happened after that? Nothing whatever was done in the attachment proceeding. On the same day Thompson had previously made an assignment for the benefit of creditors to his son, which was recorded at 12.39 p. m. at Philadelphia (R., pp. 58 and 59 and 188, fols. 48 and 566), about two hours before the attachment was served on Thompson's assignee.

At the time of the assignment Thompson was indebted in something like the sum of one hundred thousand dollars, and the total of the assigned estate, as stated by his assignee, was about twenty-five hundred dollars (R., p. 97, fols. 203, 205).

Immediately upon discovering the fact that the money had been traced into the defendant's deposit account with the bank of New York, defendants were notified that it was complainant's property, and that he (Holly) claimed the money in their hands as his property and demanded a return to him of the same. This was clearly an election on his part at that time to claim the funds in the defendant's hands, and no action since then has been taken by Holly inconsistent with that claim.

The proceedings were allowed to remain in suspense, however, until it became necessary, by the action of Thompson's assignee for the benefit of creditors, in moving, on January 26, 1894, to dissolve the attachment, to make some disposition of that case on the ground set up in his petition

that Holly had refused to present any claim or submit any proof of claim (R., p. 189, fols. 569–571). This motion was pending when the plaintiff applied to this court for leave to continue the proceeding, in order that whatever moneys might be obtained from Thompson's assigned estate should be applied to the relief of whoever would eventually be the losing party in this suit—this to be without prejudice to the rights of either party in this proceeding; but it was objected to and resisted by the respondents' counsel on the ground that the complainant had already elected his remedy under the attachment proceeding, and had no right to recover the money in the present proceedings. The court refused the application, having no precedent for granting such leave where the opposite party either rightfully or wrongfully objected.

Up to the time when this application was made the respondents had not suggested in their answer or supplemental answer to the bill any defense grounded upon the alleged election of an inconsistent remedy by Holly in the issuing of the attachment process above referred to, and, in so far as this record is concerned, the defendants did not at that time or subsequently thereto make this defense to the present action.

In equity, it is the rule that no defense can be set up against a bill filed in the case unless that defense is specially made in the plea and answer to the bill as filed. In this case, to any argument that may be presented for the purpose of showing that the plaintiff had elected his remedy and was estopped thereby from pursuing this suit, we answer that no such defense was set up, and therefore no such defense can be available as a defense at this time.

"When a defendant makes his defense by answer he must set up all the various grounds of defense upon which he intends to rely."

Warren *vs.* Warren, 30 Vt., 530.

But inasmuch as this point, as to complainant's having elected his remedy, was raised by the respondents in opposition to the motion for leave to prosecute, on the 14th day of April, 1894, the complainant Holly, with leave of the court where the suit was pending, paid the costs of the attachment in Philadelphia and discontinued the same (R., p. 173, fol. 507; Complainant's Exhibit No. 8, R., p. 173). The entry of discontinuance, as it appears on the exhibit, is in the form in which discontinuances are entered according to the practice of the courts in the State of Pennsylvania (R., p. 135, D. 20, fol. 355).

By discontinuing the attachment proceedings the complainant reiterated his election to rely solely upon his right to recover from the respondents his property, the title to which he never had parted with, but has always insisted upon up to this date.

The doctrine of a conclusive election of one of several remedies by personal action rests on an equitable estoppel, but at any time previous to an adjudication he may discontinue the first action and proceed with the second.

Johnson *vs.* Frew, 33 Hun. (N. Y.), 193.

"A vendor of goods, the sale and delivery of which was induced by fraud on the part of the vendee, does not, by an effort to retake the entire property, which is successful in part only, lose the right to pursue the vendee for the value of the unfound portion; nor is the effort a defense to an action to recover possession against one in whose hands a part is found."

Powers *vs.* Benedict, 88 N. Y., 605.

"An action by a vendor against a fraudulent vendee for the price of goods, if discontinued before judgment, does not prevent an action of trover against a purchaser thereof."

See opinion by Smith, J., in Equitable Co-operative Foundry Co. *vs.* Hersee, 33 Hun., 169.

In Loeb *vs.* Willis, 100 N. Y., 231, 235, it is said:

"If a suit be discontinued at any stage, it is not an estoppel or bar in any sense. By the discontinuance of an action the further proceedings in the action are arrested not only, but what has been done therein is also annulled, so that the action is as if it never had been."

Citing Bigelow on Estoppel, 21.

In Webb *vs.* Buckalew, 82 N. Y., 555, it is said:

"Where the litigation has ended in a discontinuance, so that an actual decision on the merits has not been reached, the proceedings have no conclusive character and cannot operate as a bar."

Citing Carlisle *vs.* McCall, 1 Hilt., 399; Audubon *vs.* Excelsior Ins. Co., 27 N. Y., 216.

In Lloyd *vs.* Brewster, 4 Paige Ch., 537, cited by appellants, the second syllabus reads thus:

"If a vendor who has been defrauded in the sale of his goods proceeds *to judgment* against the vendee upon the contract of sale after he is apprised of the fraud, his election is determined."

In Mattlage *vs.* Poole, 15 Hun. (N. Y.), 556, it appears that an action was brought against both an agent and his undisclosed principal for goods sold to the agent and used by the principal. Held, that so long as no judgment was entered the plaintiff's act in suing both did not constitute an election to hold the principal and discharge the agent.

In Bach *vs.* Tuch, 47 Hun. (N. Y.), 536, an action was commenced by attachment to recover the price of goods. Afterwards an action was instituted for the recovery of the goods on the ground that they had been obtained by false representation. Held that the commencement by attachment did not preclude the subsequent action, it not appearing that the attachment was begun with the knowledge of the falsity of the representation.

In Conrow *vs.* Littel, 41 Hun. (N. Y.), 395, A obtained

plaintiff's goods by means of a forged note. When plaintiff learned of the forgery he sued A and obtained an attachment. Then learning that A had transferred the goods to B, plaintiff discontinued and sued B. Held that the action against B was maintainable.

In Hays *vs.* Midas, 39 Hun. (N. Y.), 460, A was induced by B's false and fraudulent representations to sell goods to him. A began suit on contract and attached the goods. Fifteen other attachments preceded A's. A discontinued and began a replevin suit to recover the goods. There was no evidence that when A began his attachment suit he knew of the fraud. Held, that he could maintain his replevin suit.

In Fowler *vs.* Bowery Savings Bank, 113 N. Y., 450, 455, W. deposited money with the defendant savings bank in trust for his wife, E. The pass book read: "In account with W. for E." Afterwards both W. and E. died, and plaintiff, E.'s executor, demanded the deposit of defendant. W.'s executor presented the pass book and received the deposit. Held, that plaintiff, by suing W.'s executor for the amount of the deposit, ratified the payment to him, and having then exercised his election, could not afterward maintain an action therefor against the bank. But the court (Earle, J.) said:

"If the money had been absolutely the money of the plaintiff, left on special deposit with the bank, then he could have pursued the money wherever he could trace it without losing his remedy against the bank. In such a case the plaintiff would not be barred of his right of recovery against the bank until he had either recovered his money or the value of the same. All his remedies would be consistent, being based upon the theory of a wrongful disposition of his property."

See also Nat. Bank *vs.* City Bank, 103 U. S., 668.

The decree of the learned judge of the circuit court for $10,028.82 went upon the ground that so much of Holly's

money was by Thompson's check turned over to defendants. By this finding there was left in Thompson's hands $1,971.18, which was wrongfully paid out by him to other parties, and for which the attachment might properly have been continued, but to avoid all questioning on this point the attachment was discontinued and the costs of suit paid by plaintiff.

In the present case it is difficult to understand how the prosecution of a remedy for the recovery of so many dollars out of Thompson's estate as might have been had under the attachment proceeding, and would necessarily be in relief of the respondents in this proceeding, can be considered as an inconsistent remedy, debarring complainant of his rights in the present action.

It should be borne in mind that the Missionary Society was purely a legatee, and, as such, a mere volunteer. It gave no value whatever for the amount received from Thompson. It did not in any way release its claim upon the executors, and it stands today in the same relation to them as it did before the money was paid. The proofs show that the Missionary Society in no way assumed any new obligation or made any change in its affairs predicated upon the possession of this money. The business of the society, which is not a commercial one, was entirely unchanged as to its course and methods.

The case of Swift *vs.* Tyson and kindred cases, relied upon by the circuit court of appeals, announce a principle applicable solely to commercial transactions, and, it is respectfully submitted, have no bearing upon the facts in this case. All the cases cited by the counsel for the defendants go upon the same ground, and in all of them value was given and important rights released.

If the decree of the circuit court of appeals is allowed to stand as the law governing cases like this, it will not be difficult for a trustee disposed to be dishonest to easily divert the funds of his *cestui que trust* in order to satisfy the claims of his creditors. The questions arising in this case,

particularly that of the relation of a legatee to the estate from which the legacy is derived, have never been formally decided by this court and are of great importance to every citizen of this country.

It is submitted that in the last analysis the opinion of the circuit court of appeals, while conceding that Thompson feloniously diverted this trust fund, amounts simply to this:

1. That the Missionary Society innocently received Thompson's check—that is to say, that the circumstances attending the transaction in this case were insufficient to put the Missionary Society upon inquiry as to the sources from which Thompson derived his money.

2. That it is quite immaterial where Thompson got the money if the Missionary Society received it innocently, as is assumed in the opinion.

3. That it is entirely immaterial whether the money at the time the notice was given remained intact, in judgment of law, in the hands of the Missionary Society.

4. That under the circumstances disclosed in this case the Missionary Society is entitled to hold this money as against its lawful owner, solely and only because it did not have direct evidence that Thompson had acquired it illegally.

5. That the facts (1) that the Missionary Society did not, upon receipt of Thompson's individual check, release the executors of the Saul estate, (2) did not change their relation to their business, or make any new obligations, (3) and did, in judgment of law, have this very money in possession at the time the notice was given, are utterly immaterial to the determination of the questions in this case.

6. It is conceived that the law is and ought to be that under the circumstances disclosed in this case, these three facts are of the utmost materiality, and, being established as they are by the evidence, entitle the petitioner here to a review of the judgment which has been rendered against him, and ultimately to a reversal of that judgment.

It is therefore submitted that the decree of the circuit court of appeals should be reversed, and the decree of the circuit court for the southern district of New York be affirmed.

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JAMES H. McKENNEY,
Clerk

U. S. Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

JAMES HOLLY,
Complainant and Appellee,

vs.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH OF THE UNITED STATES OF AMERICA and E. WALTER ROBERTS,
Respondents and Appellants.

Brief for Appellee.

(The references in this brief are to the pages and folios in the Printed Transcript of the Record (*i. e.*, Plaintiff's Bill, R., pp. 1 to 11, &c.), except where they are otherwise specially indicated.)

This action was brought to establish against the respondents a trust in favor of the complainant for the amount of $12,000.

The bill was filed on the 16th day of January, 1891 (R., pp. 1–11). The respondents filed their answer on the 30th day of April, 1891 (R., pp. 12–23).

The complainant filed exceptions to the answer (R., pp. 24–29) about the 13th day of June, 1891, and the respondents interposed a further supplemental answer (R., pp. 30–44).

The complainant filed a further replication to the answer and the amended supplemental answer (R., pp.

45, 46) on or about the 23d of January, 1892, and thereafter the proofs were taken.

Statement of the Case.

1. James Holly, a citizen of Philadelphia, employed Henry C. Thompson, who was an attorney at law and a conveyancer, and also the solicitor for the Real Estate Title Company of Philadelphia, to examine the title to a property which Holly had purchased, and on approval of it, to make settlement for the same with the vendor. On June 19, 1890, Thompson, falsely representing that the papers were ready, obtained a check from Holly for $12,000, which he filled up and made payable to his *own* order as attorney, and gave Holly his receipt for the amount to be applied to the "purchase of house No. 643 North Fifteenth street," Philadelphia.

2. More than two years before this, on December 23d, 1887, letters testamentary were granted to said Thomson and Rev. Dr. Watson, as executors of the will of Dr. James Saul, deceased, in which the Domestic and Foreign Missionary Society was named as sole residuary legatee. On the 26th day of September, 1889, the executors filed their account, and by the adjudication of the Orphans' Court, filed on the 4th day of November, 1889, and which was confirmed absolutely, the whole of the residuary estate was awarded to be paid to the society as sole residuary legatee. But the society never took any legal steps to enforce payment of the legacy. Previous to the account being filed Thompson had actually embezzled all the funds of the Saul estate. As inquiry was occasionally made of him from time to time about its payment, Thompson put them off with repeated promises until the evening of the 18th of June, 1890, when his co-executor called on him and requested him to exhibit the securities in which he (Thompson) said the estate was invested. Thompson promised to do this at one o'clock the next day. On the next day (19th inst.) Holly

stepped into Thompson's office to inquire how his business was being proceeded with, and was then falsely informed by Thompson that the papers were ready, that everything would be right and he would have everything settled in a few days, and requested Holly to give him a check for the purchase money, and on that day Holly gave to Thompson his check on the Fidelity Insurance, Trust and Safe Deposit Company for twelve thousand dollars ($12,000) to be applied to the purchase, of which the following is a copy :

(Copy of Check.)

No. PHILADELPHIA, June 19, 1890.

The Fidelity Insurance, Trust & Safe Deposit Co., Pay to Henry C. Thompson, Att'y, or order, Twelve Thousand Dollars.

($12,000.) (signed) JAS. HOLLY.

Thompson thereupon gave Holly a receipt, which was in the words following :

(Copy of Receipt.)

PHILADELPHIA, June 19th, 1890.

Received from James Holly, twelve thousand dollars, and J. A. Freeman's receipt of $200, to be applied to purchase of house No. 643 North Fifteenth Street.

($12,000.) (signed) H. C. THOMPSON.

Thompson deposited the check in his own private account with the Union Trust Company, of Philadelphia, and immediately thereafter, on the same day, Thompson drew his personal check upon the said Union Trust Company for fifteen thousand five hundred and seventy seven dollars and fifty-four cents ($15,577.54) to the order of the respondents, The Domestic and Foreign Missionary Society of the Protestant Episcopal Church. He took this check directly to New York and delivered it to E. Walter Roberts, the assistant treasurer, at the

office of the society in that city about one o'clock P. M. of the same day. This check was paid in due course by the Union Trust Company on the 21st day of June, 1890.

At the time Thompson drew his check, he had only about four thousand dollars to his credit in the Union Trust Company over and above the twelve thousand dollars belonging to the complainant. The check of fifteen thousand five hundred and seventy-seven dollars and fifty-four cents ($15,577.54), together with the other checks of Thompson, which were drawn upon the Union Trust Company prior to and including the 21st day of June, 1890, left a balance to Thompson's credit in the Union Trust Company at the close of that day of only eight hundred and twenty-six dollars and three cents ($826.03).

Thus it was proven by the testimony that under pressure of his co-executor's demand to see the securities of the Saul estate at one o'clock of that day, Thompson fraudulently procured from Holly the check for twelve thousand dollars, and with the use of Holly's check and his own check as above stated, he wrongfully turned over Holly's money to the possession of the defendants as on account of the securities and money payable to the Saul estate. The wrongful intent with which Thompson procured Holly's check is also shown by Thompson's letter to his co-executor, written just before he started to New York, as follows:

HENRY C. THOMPSON,
Attorney & Counsellor at Law,
1001 CHESTNUT STREET,

PHILADELPHIA, June 19, 1890.

MY DEAR DOCTOR:

I am going to New York this morning to settle the Saul matter in full with the Board of Missions and also to get their consent to the discharge of the executors. I write to save you the trouble of coming down

at one o'clock and also to ask you to call to-morrow morning at one to sign petition for discharge.

Yours truly,

(Signed) H. C. THOMPSON.

On July 17th, 1890, Holly discovered Thompson's misappropriation of his money, and traced it into the possession of the society, and immediately notified the society of his claim. The money had been deposited by the defendants in the National Bank of New York, and was still on deposit in that bank to their credit at the time (July 17th, 1890) when Holly notified the defendants that it was his money, as is shown by the daily balances of the defendants' account with that bank, which from June 19th to July 18th, 1890, largely exceeded $30,000, after payment of all the society's checks drawn and presented at the end of each day, the smallest balance at the end of any day in that period being July 1st, 1890, when it was $33,431.86, or more than $21,000 exclusive of Holly's money (R., pp. 153 to 171, folios 429 to 499, and p. 195, folios 592 to 595).

On this state of facts the plaintiffs claimed a decree for the return of Holly's money, with interest.

The decree as entered by Mr. Justice WHEELER April 6th, 1898, is in these words (see p. 257 of the Printed Record):

Decree.

"This cause coming on regularly to be heard upon the bill and answer and all the other pleadings, papers and proceedings herein, and upon the proofs submitted, and having been argued by counsel, and due consideration being had thereon;

Now, on motion of Cephas Brainerd, Esq., attorney for complainant, it is hereby

Adjudged and decreed that the complainant James Holly do recover of the respondent The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America the sum of

ten thousand twenty-eight and $\frac{82}{100}$ dollars, with four thousand six hundred forty-one and $\frac{62}{100}$ dollars interest thereon from the 19th day of July, 1890, amounting to fourteen thousand six hundred seventy and $\frac{44}{100}$ dollars, together with the costs of this action taxed by the Clerk of this Court at six hundred and seven and $\frac{98}{100}$ dollars, making in all the sum of fifteen thousand two hundred seventy-eight and $\frac{42}{100}$ dollars, and that he have execution therefor.

(Sd). HOYT H. WHEELER."

Review of the Errors Assigned by the Appellants in Above Case.

The principal contention of the defendants in this case was that Thompson was indebted to the defendant missionary society in an amount greater than the sum of $15,577.54, and that the check for that amount was given to the society in payment of that debt; that this sum was received by defendant in good faith, and without notice of any equity or claim on the part of the complainant.

First, Second and Third Assignments of Error.

It is submitted that the ruling of the learned Judge, which is made the subject of the first three of Defendants assigments of errors, was not erroneous for the reasons set forth in his opinion as filed and upon the authorities cited by him therein, which rule the present case.

1st. It cannot be disputed that Thompson obtained from the complainant Holly the $12,000 as a trust fund.

Thompson filled up the check for $12,000, making it payable to himself as attorney (R., pp. 50 and 94). He drew the receipt, in which he expressly stated that

it was for "Twelve thousand dollars, and J. A. Freeman's receipt of $200, to be applied to purchasing house No. 643 North Fifteenth street." This was an express acknowledgment and declaration on Thompson's part that the $12,000 was obtained from Holly as a trust fund for the purpose mentioned. By Holly's check to Thompson's order as attorney, Thompson was appointed trustee for the fund. This was all that was necessary to perfect the trust as completely as could possibly be done in the creation of any express trust.

"Express trusts are also called direct trusts. They are generally created by instruments that point out directly and expressly the property, persons and purposes of the trust."

1 Perry on Trusts, Sect. 24.

2d. Neither can it be disputed that the trust fund was wrongfully, fraudulently and feloniously obtained and misapplied. Holly's money was actually stolen from him by Thompson.

The intent and purpose with which it was obtained is shown by the fact that his coexecutor, after numerous demands had been made upon Thompson, called upon him on the evening of the 18th and demanded to see the securities in which Thompson had all along declared that Saul's estate was invested, and Thompson agreed to produce them the next day, at one o'clock, when his coexecutor was to call andexamine them (R., p. 83, fol. 146–147). After thus promising what he knew he could not perform, and being without other available means to secure the amount required to be paid to the Saul Estate, he took advantage of Mr. Holly's calling the next morning to inquire about his business, to induce Holly, by falsely stating that the papers were ready, to deposit the $12,000 in his (Thompson's) hands for the purchase of the property. Thompson's immediately taking that money and depositing it in his individual account and drawing upon it a check for $15,577.54 in favor of defendants, and handing that check over to defendants

is conclusive of the intent with which Thompson obtained Holly's money. The whole transaction was a continuous one, so far as Thompson was concerned, beginning with his falsely inducing his client Holly to hand him the check, under the pressure of the disclosure of his wrong doings in Saul's Estate, which would inevitably follow if he had not taken this course. Hence, it is submitted that the present case has all the characteristics of a felonious stealing or theft by Thompson of Holly's money with the preconceived purpose of misappropriating it and the immediate carrying out of that purpose to its conclusion. It was one transaction from beginning to end; it was a felonious taking of Holly's check for the whole twelve thousand dollars, as it was intended to be by Thompson, and it was also intentionally misappropriated. It was an absolute theft of Holly's money (R., p. 50, fols. 13–16; R., p. 138, fols. 364–371).

To obtain a bill of exchange from an endorser under pretense of getting it discounted is felony if the jury find that the prisoner undertook to discount it with a preconcerted design to convert the money to his own use. The King vs. Aickles, 1st Leach, 294, cited in 2 East Pleas of the Crown, p. 675, where, on page 682, in the case of a delivery for a special purpose, the general rule is expressed as follows: "Where by the delivery a special property and consequently a legal possession would be transferred there, if it be found that such delivery were fraudulently procured with a felonious intent to convert the property so acquired, the taking amounts to larceny."

In Shipley vs. People, 86 N. Y., 375, the owner sold to the accused goods to be paid for on delivery, and delivered them to the carrier with instructions to collect the price before delivering to the purchaser. The latter received the goods and paid for them by a worthless check, and he was held rightly convicted of larceny, the Court, in the course of the opinion, saying: "The jury may have found that this was his scheme at the beginning, and thus that there was on his part a felonious intent, an *animo furandi*, pervading the tran-

saction and continuing to the end; that there was no delivery by the owner or parting with the title, and, if so, the verdict was right."

Smith vs. People, 53 N. Y., 111, reported in Lawyers' Co-operative Edition, Book 11, foot page 419. See editor's notes, foot pages 420 to 422, where the cases on this point are reviewed.
State vs. Henderson, 66 N. C., 627.
Loomis vs. People, 67 N. Y., 322.

In defining embezzlement, Webster draws this distinction between it and larceny:

"Larceny denotes a taking by fraud or stealth from another's possession; embezzlement denotes an appropriation by fraud or stealth of property already in the wrongdoer's possession" (per BROWN, J., in Moore vs. United States, 160 U. S., 268, 269, 270, cited in 1st Bouvier's Dictionary, Rawles' Revision, 655).

Bouvier's definition of larceny is: "The wrongful and fraudulent taking and carrying away, by one person, of the mere personal goods of another from any place with a felonious intent to convert them to his, the taker's, use and make them his property, without the consent of the owner."

The learned Judge, in his opinion (R., p. 253), cites the cases of Wilson & Co. vs. Smith, 3 Howard (U. S.) 763, and National Bank vs. Insurance Co., 104 U. S., 54, and says:

"In the former case the defendant had collected a draft belonging to the plaintiff, received from a person who had received it from the plaintiff, and credited the proceeds to the person from whom the defendant received it on an account before due, without any knowledge that it belonged to the plaintiff or did not belong to him. The plaintiff there was held to be entitled to recover, at law, because the money belonged to him, and no new transaction had arisen between the defendant and the one from whom he received it, but the crediting of it on the previous debt. The defendant here is in the same situation in respect to this money, except that the money was delivered in breach of trust,

which is no betterment. In the latter, after a thorough examination of the cases, money is said to be recoverable by the true owner so long as it is traceable, and its possession with liability of its recovery has wrought no disadvantage."

In this case the learned Judge concludes his opinion in these words : " But the defendant has not shown that this particular money has been applied to any particular purpose as coming from Saul, or otherwise than as it would use its general funds in furtherance of its objects, nor that any of this particular money was applied to any of its purposes." It is submitted that there was no error in this finding on the part of the learned Judge, and that the defendants have not pointed out a single piece of evidence from which it can be inferred that the defendants collected this check of Thompson for value and without notice of the alleged equity on the part of the complainant. There is no evidence whatever to support the position taken by defendants in this third assignment of error. The conclusion reached by the learned Judge in his opinion was that $10,028.82 of Holly's money had, through the wrongful misappropriation of the same by Thompson, gone into the hands of the defendant, and that this money had come directly from and belonged to Holly the complainant.

It is submitted that Holly had never parted with his ownership of the money, and Thompson therefore could not make title to another for property of which he was not the owner.

" If a trustee deposits trust moneys in bank to his own credit, mixed with other deposits of his own money, the Court will disentangle the accounts and give the *cestui que trust* what belongs to them. And the same will be done wherever property held in trust has been wrongfully mixed or misapplied, though in the hands of a third person, unless he is a *bona fide* purchaser without notice ; but the bill must specify the property which it identifies with the trust fund."

2 Perry on Trusts, Secs. 837 and 838.

"The general proposition which is maintained both at law and in equity upon this subject is that if any property in its original state and form is covered with a trust in favor of the principal, no change of that state and form can divest it of such trust or give the agent or trustee converting it, or those who represent him, in right (not being *bona fide* purchasers) any more valid claim in respect to it than they had before such change."

2 Story Eq. Jur., Section 1258.

"Equity impresses a constructive trust upon this species of property, not only while it is in the hands of the original wrongdoer, but as long as it can be followed and identified in whosesoever hands it may come, except unto those of a *bona fide* purchaser for value, without notice, and the Court will enforce the constructive trust for the benefit of the beneficial owner or original *cestui que trust* who has thus been defrauded."

2 Pomeroy's Eq. Jur., p. 1562, Ed. of 1892, Sect. 1051.

"And the better opinion on authority now is that even as to creditors the mixing of trust funds with private in a general deposit does not obliterate the trust."

2 Perry on Trusts, Sec. 828.

"And it may be added that an abuse of trust can deprive the *cestui que trust* of no rights, so long as the property or its proceeds can be traced and identified in the hands of those who have full knowledge of all the equities."

2 Perry on Trusts, Sec. 835.

In the case of Pennell vs. Deffell, 4 De G. M. & G., 372 and 388, Lord-Justice TURNER says: "It is, I apprehend, an undoubted principle of this Court that, as between *cestui que trust* and trustee and all parties claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property

belonging to a trust, however much it may be changed or altered in its nature or character, and all the proofs of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust."

Vice-Chancellor Sir W. PAGE WOOD, in Frith vs. Cartland, 2 Hem. & M., 417 and 420, said that Pennell and Deffell rested upon and illustrated two established doctrines. One was that, "so long as the trust property can be traced and followed in other property, into which it has been converted, that remains subject to the trust;" the second is "that if a man mixes a trust fund with his own the whole will be treated as the trust property, except so far as he is able to distinguish what is his own."

The whole subject was very elaborately reviewed by the Court of Appeals in England in the very recent case of Knatchbull vs. Hallett, *In Re* Hallett's Estate, 13 L. R., Ch. D., 696.

It was there decided that, if money held by a person in a fiduciary character has been paid by him to his account at his bankers, the person for whom he held the money can follow it.

The Master of the Rolls, Sir GEO. JESSEL, in Clayton's Case, 1 Mer., 572, showed that the modern doctrine of equity as regards property disposed of by persons in a fiduciary relation is that, whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify it.

The principle is illustrated by many cases in this country.

Farmers' and Mechanics' National Bank vs. King, 57 Pa. St., 202.
Van Allen vs. American Nat. Bank, 52 N. Y., 1.

It has been repeatedly recognized in the Supreme Court of the United States. The leading case is National Bank vs. Ins. Co., 104 U. S., 54.

Oliver vs. Piatt, 3 How., 333 and 401.
May vs. LeClaire, 11 Wal., 217.

Bayne vs. U. S., 93 U. S., 642.
U. S. vs. State Bank, 96 U. S., 30.
Manhattan Bank vs. Walker, 130 U. S., 267.
Jones vs. Van Doren, 130 U. S., 684, 691.
Peters vs. Bain, 133 U. S., 670, 694.

In Swift vs. Williams, 68 Md. Rep., 236, decided in the Maryland Court of Appeals, W. and V. were trustees for the sale of certain real estate. W., being about to go abroad, obtained an order from the Court authorizing V. to receive the purchase money from the purchaser, and in all respects to act as fully in all matters pertaining to said trust as if both were present and acting. The purchaser gave V. a check for the purchase money, payable to the order of W. and V. trustees. V. endorsed this check with his own name only as trustee to the Manufacturers' National Bank for deposit, giving the bank a copy of the Court order, and opened account in that bank in his name as sole trustee, although there was at that time an account in the bank in the name of both trustees. On the same day V. drew a check for a portion of said deposit on said bank, signed by himself alone as trustee, in payment for a debt of a certain company of which he was sole trustee, to one Swift, which debt was in no way connected with the said trust fund, and the check on reaching the Manufacturers' Bank through the Clearing House was charged to the said account of V. as sole trustee.

The bank on which the check was drawn which was given to V. and made payable to the order of both trustees by the purchaser of the trust real estate, refused to honor it because endorsed by V. alone. V. thereupon arranged with the Manufacturers' Bank to alter the endorsement by signing W.'s name as trustee, and to change the deposit so as to stand in the names of both trustees. The bank on which the purchasers' check was drawn refused, however, to honor it on such new endorsement, and the purchaser obtained a cashier's check from said bank for the same amount and deposited it in the Manufacturers' Bank to the

joint credit of W. and V., trustees, and took up his own check. Thereupon V. added the name of W. trustee, per V, trustee, to the check he had theretofore drawn on the Manufacturers' Bank, and it was charged up by that bank against the account in the name of both trustees.

A bill in equity was filed against V., the Manufacturers' Bank and Swift, to whom the amount checked out by V. was paid, to compel the replacement of the trust money which was misappropriated through the the check given by V. to S. in payment of a debt which was in no way connected with said trust fund. It was held that the defendant bank equally with the other defendants was bound to see that the trust fund, improperly appropriated through its aid, was made good, and that the question was not one of primary and secondary liability, but whether all who had participated in any degree in bringing about the wrong should not be compelled to see it righted. And, further, that an antecedent debt does not form a valuable consideration in a case of this kind, so as to make a creditor, who is paid from a wrong trust fund, a purchaser without notice.

Per IRVING, J.: "Swift cannot be regarded as a *bona fide* purchaser without notice. He was the creditor of the Gazette Publishing Company, and of its funds in the hands of Veazy, its trustee. As such creditor he received payment from funds belonging to the Bull estate, and from none belonging to the publishing company. The general rule is that an antecedent debt does not form a valuable consideration in a case of this kind, so as to make the creditor, who is paid from wrong funds a purchaser without notice (2 Pomeroy, Eq., 622, and authorities cited."

Swift vs. Williams, 68 Md., 236, is cited in 2d Pomeroy's Equity (Ed. of 1892), Sect. 747, note, page 1044, as an authority for the statement in the text that "No person who has acquired title as a mere volunteer, whether by gift, devise, inheritance, post-nuptial settlement on wife or child, or otherwise, can thereby be a *bona fide* purchaser."

Fourth Assignment of Error.

Under this assignment of error, the contention of the appellants is to the effect that Thompson and Dr. Watson, as executors of the will of James Saul, deceased, having filed their account in the Orphans' Court of Philadelphia County, showing a balance due to the defendant missionary society of $14,927.54, which account was confirmed absolutely November 23d, 1889, thereby became jointly and severally liable to the defendant missionary society for the entire amount (Defendant's Exhibit J, R., p. 249, fol. 325, and Exhibit O, R., p. 44, fol. 170); and, being thus indebted, defendants' counsel contend that the giving of the check constituted the missionary society a holder for value of Holly's money.

The rule that the transfer of negotiable paper before maturity in payment of an antecedent debt constitutes the transferee a holder for value is applicable to negotiable commercial paper alone. It has no application to the transfer of negotiable paper which has matured, or to the payment of a check which is payable on demand.

Moore vs. Ryder, 65 N. Y., 438.

The defendants cannot claim to be *bona fide* purchasers for value without notice in this case, because they were actually informed of facts and circumstances and had oft-repeated warnings which put them upon inquiry, that, if made and followed up, would have led them directly to full knowledge of the embezzlement of the whole of Saul's estate and of Thompson's insolvency long before they obtained Holly's money. With this knowledge of his insolvency Defendants would not have accepted Thompson's individual check as a payment on account of the legacy. The pretense that this was an ordinary commercial transaction is absurd. It has no single feature according with such dealings. The attempted payment of a legacy three years past due in a check not drawn by

the executors, but by an individual, where no release or discharge was given, bears no resemblance to the payment of an individual note by the maker with his own check and receiving that paid note from the holder.

With notice of Thompson's embezzlement, the respondents accepted his individual check for $15,577.54 instead of demanding from him the securities in which they had been informed that the estate was invested. At the same time Thompson handed them the following memorandum, which was in his handwriting:

Estate James Saul:	
Balance as per account filed	$14,927 54
Dividends received since, not included in account	650 00
	$15,577 54

But, in accepting his individual check, they knew that they could only rightfully claim payment of it out of what individual moneys he might then have in the bank to his credit. They could not thereby acquire any property or right to trust funds that Thompson might have obtained from other parties and deposited with his own moneys in his individual account, upon which the check was drawn.

"A check is, by its face, the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer."

Grant on Banking, 85.
Keene vs. Bread, 8 C. B. N. S., 373.

It is contended by the respondents that they became *bona fide* holders for a valuable consideration of this fund by virtue of their having received it on account of this legacy; but the fact is, they did nothing but simply receive the money; they parted with nothing whatever at the time. They did not release Thompson or his co-executor; they simply gave him a receipt as "from Executors Estate James Saul," for so many dollars in money (fols. 130-132). It did not state what

it was on account of, whether it was a legacy or a debt *due* the society.

Under these circumstances the respondents can plead neither innocence nor consideration.

Where an owner has been apparently deprived of his title by a fraudulent conveyance or assignment, which is void, as where, after being executed by him for one purpose, it was fraudulently altered without his knowledge or authority * * * and he has done no collateral act with reference to it which might amount to an equitable estoppel by conduct, and the property, by means of such transfer, comes into the hands of a purchaser for value and without notice, the original defrauded owner is not barred of his remedy. Equity will relieve by canceling the fraudulent apparent transfer and by compelling a conveyance or reassignment, even as against the holder who is innocent of wrong; the doctrines of equitable estoppel and of *bona fide* purchase do not apply under these circumstances. Such is the doctrine announced by decisions of the highest authority.

2 Pomeroy's Eq., Ed. of 1892, Sect. 918, p. 1302 3, citing Ogilvie vs. Jeaffresen, 2d Gifford, 353.

Swan vs. N. British, &c., Co., 7 Hurlst & N., 603.

Taylor vs. Railway Co., 4 DeGex & Jones, 559.

Donaldson vs. Gillot, L. R., 3 Equity, 274.

Barnard vs. Campbell, 58 N. Y., 73; s. c., 55 N. Y., 456.

The respondents had ample notice of Thompson's repeated defaults in respect to the payment of the legacy, by reason of his repeated refusals to make any reply to their inquiries. Each refusal was sufficiently aggravated to put the respondents upon further inquiry, that if followed up would have led directly to the discovering of Thompson's embezzlement of the Saul estate long before he could have obtained possession of Holly's money, and perhaps in time for them to have saved or recovered at least a part of the embezzled funds.

By the law of Pennsylvania, after one year from testator's death, proceedings might have been taken (R., p. 74, fol. 111 ; p. 100, fol. 215) that must have compelled a disclosure by Thompson of his conversion of part of the securities of the estate and the handing over of the remainder of them to respondents at that time.

"Where a judgment of a foreign court was offered in evidence in Wisconsin judicial notice was taken of the law of the state where it was rendered."

Jarvis vs. Robinson, 21 Wis., 523.
Cutler vs. Wright, 22 N. Y., 472.
Condit vs. Blackwell, 19 N. J. (Eq.), 193.
State of Ohio vs. Hinchman, 27 Pa. St., 479.

But, as a matter of fact, the defendants were actually informed by Thompson, December 28, 1887, that they might expect payment of the legacy in the summer or early fall of 1888.

The respondents had at least eight additional notices or warnings relating to Thompson's embezzlement of the Saul Estate.

1. By receiving no reply from Thompson to letter from respondents to him, dated July 26, 1888, stating that "the fiscal year of this Society closes September 1st," and asking "whether it is likely that the Society's interest under the will of the late Dr. Saul can be paid by that date" (Exhibit C, Defendants' Supplemental Answer, R., p. 38, fol. 147).

2. By receiving no reply from Thompson to letter from respondents to him, dated February 20, 1890, in which respondents wrote as follows : "We received in Dec., 1887, a letter from you respecting the Estate of the Rev. Dr. Saul in which you said that this Society might expect to receive the residuary interest in the summer or early fall of 1888. Will you kindly inform us further in the matter ?" (Exhibit E, Defendants' Supplemental Answer, R., p. 39, fols. 151 and 152).

3. Letter of Dr. Watson to respondents, dated April

15, 1890, in which he writes as follows: "If the legacy is not forthcoming this month, so as to be acknowledged in the May number of the 'Spirit of Missions,' you yourself should stir up the gentleman in the matter" (Exhibit F, Defendants' Supplemental Answer, R., p. 40, fols. 153–155).

4. By receiving no reply from Thompson to letter from respondents to him, dated April 17, 1890, in which respondents wrote: "Not having heard from you in reply to my last Feby. 20 inquiring about the bequest of Rev. Dr. Saul to this Society, I write now to ask if you will inform us of the reason for delay in paying the legacy. You wrote us in 1887 that we might expect it in the summer or early fall of 1888" (Exhibit G, Defendants' Supplemental Answer, R., 40, fols. 156 and 157).

5. Postal card of Dr. Watson to respondents, dated April 25, 1890, saying: "Mr. T. has just informed me that he will send on the money to-morrow" (Exhibit I, Defendants' Supplemental Answer, R., p. 41, fol. 160).

6. Letter of Dr. Watson to respondents, dated April 29, 1890, asking "Did the money reach you the next day, as I wrote you it probably would, or not? I am anxious to know" (Exhibit J, Defendants' Supplemental Answer, R., p. 41, fol. 161).

7. Letter of Langford to Dr. Watson, dated May 24, 1890, saying: "We have heard nothing from your co-executor, although we have written to him several times since he wrote that the legacy would be paid in the summer or fall of 1888. It is almost a month since you wrote us that he had promised you that he would send it to us the next day" (Exhibit K, Defendants' Supplemental Answer, R., p. 42, fol. 163).

8. Letter of Dr. Watson to respondents, dated May 29, 1890, saying: "My co-executor seems to be invul-

nerable to any shaft that you or I may send. After learning of the forfeiture of his last word, I wrote him as sharp and scathing a letter as I knew how. But it does not seem to have disturbed him a bit, for he has sent no reply" (Exhibit M, Defendants' Supplemental Answer, R., p. 43, fols. 166–168).

What more positive notice of an embezzlement or defalcation could there be than was given to respondents in this case? A neglect or refusal to pay, after eight or ten different demands, is the strongest kind of proof that a debtor either is insolvent and therefore cannot pay, or that he is wrongfully making use of the money for his own purposes, which, in either case, is nothing less than evidence of an actual embezzlement of trust funds.

Watson's last notice to respondents, on May 29th, 1890, was received twenty days before Thompson obtained Holly's money. On any day within that time, had respondents promptly taken a two hours' ride from New York to Philadelphia, and personally demanded from Thompson the delivery to them of the money and securities of Saul's estate, they would as promptly have learned the fact that he had long before embezzled all the moneys and assets of the Saul estate and was hopelessly insolvent.

This is proven by the facts and circumstances which led to the discovery by the trustee of Thompson's embezzlement of other trust funds, at or about the same time that Holly's money was obtained. The Real Estate Title Company, of which Thompson was then solicitor, and also a director, having accidentally learned that Thompson had been instrumental in securing for the company the appointment of trustee for an estate, and thereby received into his hands the trust funds, demanded from him immediate payment of the same; he was forced to acknowledge that he had used the funds and could not pay over the same as required. He was compelled at once to resign his position with the company, and to secure the company against loss by giving a mortgage, date June 23, 1890

(Holly's money was obtained June 19, 1890), on his mansion house and real estate in New Jersey, for fifteen thousand dollars, to cover the amount of defalcation to that company. Had the respondents used the same diligence on receipt of Watson's letter of May 29, 1890, and thereby learned of Thompson's defalcation, they might have obtained the security of Thompson's mortgage before the Real Estate Title Company had learned of his embezzlement of their funds (R., pp. 109–112, fols. 252–262).

It was respondents' gross neglect that prevented them from making the discovery, after so many repeated warnings; they are chargeable, not with notice of mere suspicious circumstances, but with actual knowledge of the embezzlement, as fully as if they had followed up these repeated notices, and thereby became actually informed of it.

When the defendants received the individual check of Thompson, they evidently looked upon it with suspicion, for Mr. Roberts, the assistant treasurer, testified in his cross-examination as follows (R., 222, fols. 222 & 223):

"118 x-Q. Suppose you state as nearly as you can what conversation took place between you? A. I have the original memorandum handed to me with the check. Mr. Thompson simply said, 'I am Mr. Thompson (mentioning his initials). Here is so much on account of the Saul legacy,' and he made a check with this memorandum and asked me for a receipt on account. I left Mr. Thompson and went into the secretary's room and we spoke together. I made out a receipt and handed it to Mr. Thompson and he went out."

What passed between Mr. Roberts and the secretary is not given in this testimony, but the receipt on its face indicates acceptance with suspicion attending it. It is in these words (R., p. 79, fols. 130 & 131):

NEW YORK, June 19th, 1890.

Received from Executors Estate James Saul, late of Philadelphia, Pennsylvania, Fifteen thousand five hundred and seventy-seven and fifty-four hundredths.

$15,577.54.

GEORGE BLISS,
Treasurer.
per E. WALTER ROBERTS,
Ass't Treasurer.

Let it be remembered that only about three weeks before this defendants were informed by Dr. Watson that "most of the legacy was in bonds and so accumulating interest to the credit of the legatee." But they receive Thompson's individual check without asking a question *(R., p. 43, fol. 168)*.

"When a party having knowledge of such facts as would lead any honest man using ordinary caution to make further inquiries, does not make, but on the contrary, studiously avoids making such obvious inquiries, he must be taken to have notice of these facts, which, if he had used ordinary diligence, he would readily have ascertained."

Wade on the Law of Notices, 2 Ed., Sec. 11, p. 9.

"Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is also notice of everything to which it is afterwards found that such inquiry might have led. When a person has sufficient information to lead him to a fact he shall be deemed conversant of it."

Kennedy vs. Green, 3 Myl. & K., 699.

"The presumption is that if a party affected by fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it."

Angell, Lim., Sec. 187 and note.
Wood vs. Carpenter, 101 U. S., 135, 143.

"Proof of circumstances short of actual notice, which should put a prudent man upon inquiry, authorizes the Court or jury to infer and find actual notice," per HARLAN, J., in

Shauer vs. Alterton, 151 U. S., 607, 622.

In Swift vs. Williams, 68 Md., 236, it was held that the defendant, the Manufacturers' National Bank, was guilty of such negligence in failing to make inquiry as to charge it with knowledge of the true state of facts which would have been obtained by proper diligence. Then, as to Swift, it was held,

Per IRVING, J. (p. 251): "But as this is a suit for money which has been paid to Swift from an estate against which he had no claim, and from which he was not entitled to be paid, and which he has really received in mistake, so far as he is concerned; it seems to us to be wholly immaterial whether he or his counsel had actual or constructive notice of the fact that the money paid was not such money as he was entitled to have paid to him."

Fifth and Sixth Assignments of Error.

Defendants' counsel further contended at the trial that the defendant missionary society had expended the proceeds of Thompson's check before they had knowledge of Holly's claim.

This is not in accord with the facts as proved. The bank account of defendant with the National Bank of New York (R., pp. 153-171) shows that on June 20, 1890, there was a balance to the credit of the defendants in that bank of $43,569.83; that on that day there was a deposit of $16,540.26. The deposit ticket for this amount was produced and showed that Thompson's check for $15,577.54 was included in that deposit. The total amount of the balance in bank, including that day's deposit, was $60,110.09. Between June 20, 1890, and July 18, 1890, inclusive, when notice was received by the defendants that the money belonged to Holly, the defendants had received and deposited additional

sums of money, amounting to $45,265.81, making a total of deposits from June 20th up to July 18, 1890, of $105,375.90. Against this, the society had drawn checks for $74,663.96, leaving a balance of moneys belonging to defendants of $30,711.93 on deposit, July 19, 1890, the day after they received the notice that it was Holly's money, or $18,711.93 of their own money, exclusive of the $12,000 of Holly's money. During all this interval of time there was not a single day in which there was not a balance of money belonging to the society on deposit in the National Bank of New York largely in excess of the amount which belonged to Holly, and, therefore, the money belonging to Holly and not to the society, was not touched by check or draft during all that time. The defendants can only be presumed to have drawn upon their own funds and not upon any of which they obtained possession or control through the fraud of Thompson as their executor and trustee of the moneys belonging to the Saul estate. They could not profit by the fraud of their agent in paying them the money which their agent knew at the time belonged to other parties (see R., p. 195, fol. 592 to 595).

U. S. vs. State Bank, 96 U. S., 30.

Defendants further claim to be holders for valuable consideration upon the idea that having receiving the money as legatees under the will of Dr. Saul, and their assistant treasurer having clerically gone through the form of dividing the amount by three, that thereupon the moneys received from Henry C. Thompson, executor, as alleged in the fifth section of the supplemental answer (fols. 129, 130), were expended for domestic missions, foreign missions and for the benefit of the colored people in the southern or formerly slave States for the support of schools and missions, and the application is declared to have been made under a resolution of the board, passed on the 10th day of June, 1890 (fols. 172, 130). But this application could not affect moneys which belonged to another, but only such as rightfully went into the treasury of the society

for the purpose. As late as August 4, 1890, after all their previous checks had been received and paid by the bank, they still had in bank the sum of $18,610, and at no time prior thereto did they have a less sum on deposit to their credit.

The rule of legal accounting requiring that the first debit shall be charged against the first credit in an account has no application to this case. Under no circumstances could it apply to funds fraudulently obtained and deposited to the credit of the society, when the defendant had their own funds that could properly be drawn upon at the same time to meet their expenses. Deposits were made from time to time as the business of the society was ordinarily conducted, and their checks were drawn upon their deposits in the usual course, and therefore could not affect a fund which had been fraudulently transferred to their deposit account, but only their own funds, so long as those funds should be sufficient for the purposes of their business. If they had exhausted their own funds on any day between the 19th of June and the 18th of July, and had to take from Holly's money to make up the payments of the day, there might be some ground for the contention, but there was not a single day within that period when their own funds were exhausted, and, consequently, Holly's money lay in the bank wholly unaffected by their drafts upon funds which rightfully belonged to them.

Seventh, Eighth, Ninth, Tenth and Eleventh Assignments of Error.

The defendants' counsel further contended on the trial and here (Point IV.) that there was no competent evidence to show that any money of the complainant ever came into the hands of the defendant missionary society; that the books of Thompson as produced and offered in evidence were, as regards the defendants, the merest hearsay, and therefore incompetent and in-

admissible. To these errors, as thus assigned, it is replied:

First. That Henry C. Thompson was executor and trustee for, and as such the representative of the defendants at the time these entries were made in his books, and they were, therefore, the principal's entries as much as they were those of its representative in the trust.

They were not the private entries of third persons, but they were the entries of an agent or trustee in regard to the trust fund, showing his transactions relating to that fund, by which, as against third parties, the principal as well as the representative is bound. In this case the defendants allege that they had received this money in payment of a legacy of the Saul estate. What was the answer to this? Their trustees' own account showed that the money which Thompson had received on their account had long since been appropriated to his own use. How was this "hearsay," or how was this evidence incompetent, it being the evidence from his books of charges against his interest as that of their own trustee?

The relation of Thompson and his co-executor as their trustee was the same after the adjudication had been made of the executors' account as it was before the adjudication. The adjudication was an award of the residuary estate to the defendants, in money or in kind, in the condition that it was then supposed to be. Thompson was still occupying the position of trustee for these defendants at the time he took Holly's money and was acting as such trustee when he made payment to his *cestui que trust;* he was not acting in the ordinary capacity of a debtor to the society. The only effect of the adjudication was to charge the executors as trustees with the balance of the estate then in their hands as fixed by the inventory and appraisement with which they stood charged in their account as adjudicated.

"He [the executor] is considered as a trustee holding a resulting trusteeship for those entitled, either as

residuary legatees or next of kin. At no one time in this State was it [the appointment to an executorship] an extinguishment of the debt [due by an executor to the decedent], for the executor has always been held as a trustee" (Wilson vs. Wilson, 3 Binney, 557; per STERRETT, J., in Pringle vs. Pringle, 130 Pa. St., 565, 569).

Whenever an agent makes a business arrangement or does an act representing his principal, what he does in respect to the arrangement or act, while it is in progress, is so far part of the *res gestæ* as to be subsequently admissible in evidence on behalf of either party. Whenever the agent's acts are so admissible, then his contemporaneous declarations explanatory of these acts are admissible; nor in proving such declarations is it necessary that he should be himself called.

2 Wharton's Evidence, Sec. 1173.

The entries in the bank-book of Thompson and in his diary, and the deposit ticket, were, with the original checks, the immediate accompaniments of the fraudulent acts of Thompson, and admissible as part of the *res gestæ*.

"Coincident business declarations are hence to be received to qualify the acts to which they relate."

1 Wharton's Evidence, Sec. 262.
See, also, 1 Greenleaf's Ev., Sec. 115.

SECOND. It is not necessary to go over all evidence as to whether or not the defendants had in their bank at the time of the notice this money of Holly. Complainant's Exhibit No. 9, R., pages 136 and 195, taken in connection with Mr. Burton's testimony (R., pp. 136 and 137, fols. 356–363) put this beyond question. From the day they deposited Thompson's money in the Bank of New York down at least to August 5th the current charges of the defendant were paid out of honest money, and the stolen fund remained in that bank to the credit, in judgment of law, of Holly, the man from whom Thompson had taken it.

Defendants say that Holly opened a debtor and credit account with Thompson. If this be so, then the fiduciary relation of attorney and client has disappeared. But, when a client delivers a bag of money to his lawyer and takes from him a receipt which declares, in accordance with the fact, that the money is to be applied to the payment of the client's purchase price of a specific lot of land, that attorney becomes something more than a mere debtor. The suggestion that money has no "earmarks" would be good if it were not that courts of equity have for years been engaged in tracing stolen money and making decrees restoring it to the legitimate owners.

In re Irish-Am. Bk., 73 N. W. R., 6.

Twelfth Assignment of Error.

The twelfth assignment of error is that the plaintiff had previously commenced an attachment proceeding, and was thereby estopped from maintaining this suit against the defendant.

The facts in this record are as follows: The plaintiff Holly was in ignorance as to the true state of his business with Thompson until the 15th day of July, 1890 (Q. 21, R., p. 50). He applied to his Philadelphia counsel, Mr. Burton, the same evening (Q. 6, R., p. 129). On the next morning the investigation was commenced, and, on the partial information then obtained, the affidavit was prepared which was made and filed (R., p. 175, fols. 512-523) on the 17th day of July (fol. 536), when the attachment as it bears date was issued and served (fols. 538-540).

Prior to the issuing of the attachment Mr. Burton had been unable to ascertain the history of the transaction. He was told by the bank that no information could be given him "unless it was in response to legal proceedings that had been taken" (R., p. 130, fol. 133). The desired information could not be obtained until after counsel for Mr. Holly had instituted attachment proceedings and had served it upon the bank which

had collected Thompson's check for the society in New York. Then, in response to Mr. Burton's inquiry (R., p. 130, fol. 335), he ascertained the course which the fund of his client had taken, and that the check was drawn to the order of the society respondent (R., p. 130, fol. 335). Mr. Burton immediately addressed a letter to the defendants (see defendants' answer, R., pp. 20 and 21, fols. 80–83), enclosing copy of plaintiff's affidavit in the attachment suit.

Now, what happened after that? Nothing whatever was done in the attachment proceeding. On the same day Thompson had previously made an assignment for the benefit of creditors to his son, which was recorded at 12:39 P. M. at Philadelphia (R., pp. 58 and 59 and 188, fols. 48 and 566) about two hours before the attachment was served on Thompson's assignee.

At the time of the assignment Thompson was indebted in something like the sum of one hundred thousand dollars, and the total of the assigned estate, as stated by his assignee, was about twenty-five hundred dollars (R., p. 97, fols. 203, 205).

Immediately upon discovering the fact that the money had been traced into the defendant's deposit account with the Bank of New York, defendants were notified that it was complainant's property, and that he (Holly) claimed the money in their hands as his property and demanded a return to him of the same. This was clearly an election on his part at that time to claim the funds in the defendant's hands, and no action since then has been taken by Holly inconsistent with that claim.

The proceedings were allowed to remain in suspense, however, until it became necessary, by the action of Thompson's assignee for the benefit of creditors, in moving, on January 26th, 1894, to dissolve the attachment, to make some disposition of that case on the ground set up in his petition that Holly had refused to present any claim or submit any proof of claim (R., p. 189, fols. 569–571). This motion was pending when the plaintiff applied to this Court for leave to continue the proceeding, in order that what-

ever moneys might be obtained from Thompson's assigned estate should be applied to the relief of whoever would eventually be the losing party in this suit—this to be without prejudice to the rights of either party in this proceeding, but it was objected to and resisted by the respondent's counsel on the ground that the complainant had already elected his remedy under the attachment proceeding, and had no right to recover the money in the present proceedings. The Court refused the application, having no precedent for granting such leave where the opposite party either rightfully or wrongfully objected.

Up to the time when this application was made, the respondents had not suggested in their answer or supplemental answer to the bill any defense grounded upon the alleged election of an inconsistent remedy by Holly in the issuing of the attachment process above referred to, and, in so far as this record is concerned, the defendants did not at that time or subsequently thereto make this defense to the present action.

In equity it is the law that no defense can be set up against a bill filed in the case unless that defense is specially made in the plea and answer to the bill as filed. In this case, to any argument that may be presented for the purpose of showing that the plaintiff had elected his remedy and was estopped thereby from pursuing this suit, we answer that no such defense was set up, and therefore no such defense can be available as a defense at this time.

"When a defendant makes his defence by answer, he must set up all the various grounds of defense upon which he intends to rely."

Warren vs. Warren, 30 Vt., 530.

But inasmuch as this point, as to complainant's having elected his remedy, was raised by the respondents in opposition to the motion for leave to prosecute, on the 14th day of April, 1894, the complainant Holly, with leave of the Court where the suit was pending, paid the costs of the attachment in Philadelphia, and discontinued the same (R., p. 173,

fol. 507; Complainant's Exhibit No. 8, R., p. 173). The entry of discontinuance as it appears on the exhibit is in the form in which discontinuances are entered according to the practice of the Courts in the State of Pennsylvania (R., p. 135, D. 20, fol. 355).

By discontinuing the attachment proceedings, the complainant reiterated his election to rely solely upon his right to recover from the respondents his property, the title to which he never had parted with, but has always insisted upon up to this date.

The doctrine of a conclusive election of one of several remedies by personal action rests on an equitable estoppel, but at any time previous to an adjudication he may discontinue the first action and proceed with the second.

Johnson vs. Frew, 33 Hun (N. Y.), 193.

"A vendor of goods, the sale and delivery of which was induced by fraud on the part of the vendee, does not, by an effort to retake the entire property, which is successful in part only, lose the right to pursue the vendee for the value of the unfound portion; nor is the effort a defense to an action to recover possession against one in whose hands a part is found."

Powers vs. Benedict, 88 N. Y., 605.

"An action by a vendor against a fraudulent vendee for the price of goods, if discontinued before judgment, does not prevent an action of trover against a purchaser thereof." See opinion by SMITH, J., in

Equitable Co-operative Foundry Co. vs. Hersee, 33 Hun, 169.

In Loeb vs. Willis, 100 N. Y., 231, 235, it is said: "If a suit be discontinued at any stage, it is not an estoppel or bar in any sense. By the discontinuance of an action, the further proceedings in the action are arrested not only, but what has been done therein is also annulled, so that the action is as if it never had been."

Citing Bigelow on Estoppel, 21.

In Webb vs. Buckalew, 82 N. Y., 555, it is said: "Where the litigation has ended in a discontinuance, so that an actual decision on the merits has not been reached, the proceedings have no conclusive character and cannot operate as a bar."

Citing

Carlisle vs. McCall, 1 Hilt., 399.
Audubon vs. Excelsior Ins. Co., 27 N. Y., 216.

In Lloyd vs. Brewster, 4 Paige Ch., 537, cited by appellants, the second syllabus reads thus:

"If a vendor who has been defrauded in the sale of his goods proceeds *to judgment* against the vendee upon the contract of sale after he is apprised of the fraud, his election is determined."

In Mattlage vs. Poole, 15 Hun (N. Y.), 556, it appears that an action was brought against both an agent and his undisclosed principal for goods sold to the agent and used by the principal. Held, that so long as no judgment was entered, the plaintiff's act in suing both did not constitute an election to hold the principal and discharge the agent.

In Bach vs. Tuch, 47 Hun (N. Y.), 536, an action was commenced by attachment to recover the price of goods. Afterwards an action was instituted for the recovery of the goods on the ground that they had been obtained by false representation. Held, that the commencement by attachment did not preclude the subsequent action, it not appearing that the attachment was begun with the knowledge of the falsity of the representation.

In Conrow vs. Littel, 41 Hun (N. Y.), 395, A obtained plaintiff's goods by means of a forged note. When plaintiff learned of the forgery he sued A and obtained an attachment. Then, learning that A had transferred the goods to B, plaintiff discontinued and sued B. Held, that the action against B was maintainable.

In Hays vs. Midas, 39 Hun (N. Y.), 460, A was induced by B's false and fraudulent representations to sell goods to him. A began suit on contract and at-

tached the goods. Fifteen other attachments preceded A's. A discontinued and began a replevin suit to recover the goods. There was no evidence that when A began his attachment suit he knew of the fraud. Held, that he could maintain his replevin suit.

In Fowler vs. Bowery Savings Bank, 113 N. Y., 450, 455, W. deposited money with the defendant savings bank in trust for his wife, E. The pass-book read: "In account with W. for E." Afterwards both W. and E. died, and plaintiff, E.'s executor, demanded the deposit of defendant. W.'s executor presented the pass-book and received the deposit. Held, that plaintiff, by suing W.'s executor for the amount of the deposit, ratified the payment to him, and having then exercised his election, could not afterward maintain an action therefor against the bank. But the Court (EARLE, J.) said: "If the money had been absolutely the money of the plaintiff, left on special deposit with the bank, then he could have pursued the money wherever he could trace it without losing his remedy against the bank. In such a case the plaintiff would not be barred of his right of recovery against the bank until he had either recovered his money or the value of the same. All his remedies would be consistent, being based upon the theory of a wrongful disposition of his property."

The decree of the learned Judge for $10,028.82 went, upon the ground that so much of Holly's money was by Thompson's check turned over to defendants. By this finding there was left in Thompson's hands $1,971.18, which was wrongfully paid out by him to other parties, and for which the attachment might properly (in the view of counsel for appellee) have been continued, but to avoid all questioning on this point the attachment was discontinued, and the costs of suit paid by plaintiff.

In the present case, it is difficult to understand how the prosecution of a remedy for the recovery of so many dollars out of Thompson's estate as might have been had under the attachment proceeding, and would

necessarily be in relief of the respondents in this proceeding, can be considered as an inconsistent remedy, debarring complainant of his rights in the present action.

It is therefore submitted that the decree of the trial Judge should be affirmed and the appeal dismissed at the cost of the appellant.

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